SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. [redacted]219

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
BASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS d/b/a CHERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, Formerly CLEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL COMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMPANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODSPRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS and/or AUSTIN MATTHEWS d/b/a HICKORY COAL COMPANY, HOWARD HIGGINS COAL COMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL COMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, ALTON JOHNSON d/b/a MAPLE COAL COMPANY, MARTIN COAL COMPANY, MARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END COAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON d/b/a HUBERT FULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL COMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN d/b/a POPLAR COAL COMPANY, JOSEPH H. GRAHAM d/b/a PINE COAL COMPANY, R. & S COAL COMPANY, J. W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., ALTON JOHNSON d/b/a SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, TENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL THOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY and NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION

For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION

For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, United Mine Workers of America (UMW), prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) entered March 5, 1970, in Tennessee Products & Chemical Corporation v. National Labor Relations Board, No. 18,357, and National Labor Relations Board v. Basham Coal Company, et al., No. 18,463. Therein the Sixth Circuit denied enforcement to a standard bargaining order of the Board based on the finding that Tennessee Products & Chemical Corporation (Products) and the respondents in No. 18,463 were part of an appropriate multiemployer bargaining unit and that their refusal to bargain with UMW, the certified representative of their employees, constituted a violation of Section 8 (a) (5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.).

OPINIONS BELOW.

The opinion of the Sixth Circuit is not yet officially reported; it is unofficially reported in 73 LRRM 2725 and appears in Appendix A, infra, p. A-1. The opinion and order of the National Labor Relations Board (Board), whose enforcement was denied by the Sixth Circuit, is officially reported at 167 NLRB No. 12 and unofficially at 66 LRRM 1022. It is printed in Appendix B, infra, p. A-40. Other relevant decisions of the Board in this proceeding are the Decision and Direction of Election in **Sewanee Coal Operators Association, Inc.** (not officially or unofficially reported), which is printed in Appendix C, infra, p. A-84; the Supplemental Decision and Order reported officially at 146 NLRB 1145 and printed in Appendix D, infra, p. A-93; and the Decision and Direction, reported officially at 152 NLRB 663 and printed in Appendix E, infra, p. A-102.

JURISDICTION

The judgment of the Sixth Circuit was entered March 5, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Did the Sixth Circuit err in holding that employers could unilaterally withdraw from a multi-employer unit, and thereby destroy the existence of the unit, after the employers had voluntarily formed the unit and started collective bargaining on a multi-employer basis?

2. Did the Sixth Circuit exceed the permissible limits of judicial review by holding that the Board had erred in finding appropriate a multi-employer unit of coal companies which had voluntarily formed the unit and started bargaining with UMW on a multi-employer basis?

STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151 et seq.), Section 9 (c), 29 U. S. C., Sec. 159 (c), and Section 10 (e), 29 U. S. C., Sec. 160 (e).

STATEMENT OF FACTS

For at least twelve years prior to the institution of this this proceeding before the Board, Tennessee Products & Chemical Corporation (Products), Tennessee Consolidated Coal Company (Consolidated), their operator-lessees,[1] and

[1] During the relevant period, Products and Consolidated did not operate any mines but Products had three tipple employees and Consolidated had a wholly owned subsidiary, Grundy Mining Com-

several independent operators in the southern Tennessee coal fields (Marion, Sequatchie and Grundy Counties) engaged in multi-employer collective bargaining with the UMW. This form of bargaining had produced a series of contracts (J. A. 15a-16a; R. I, Tr. 130-137, 161-164).[2] During this same period, Products and Consolidated controlled virtually all of the coal bearing lands in the southern Tennessee coal fields and with few exceptions the companies mining coal in that area did so pursuant to lease arrangements with Products or Consolidated (J. A. 15a, 68a; R. I, Tr. 109, 297-298, 317-318, R. II, Tr. 44).

In September, 1962, the operators in southern Tennessee voluntarily formed an organization called Sewanee Coal Operators Association (Sewanee) for the purpose of bargaining with UMW on a multi-employer basis (J. A.

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pany (Grundy), which operated a number of mines on Consolidated's property (J.A. 15a; RI Tr. 338-339, 342; RII Tr. 43). In addition to being lessors, both Products and Consolidated acted as sales agents for the operator-lessees on their properties (J.A. 15a; RI Tr. 53, 241-242, 317-318, 328-329, RII Tr. 43, Tr. 180). For this service they received a royalty on the tonnage delivered (J.A. 15a; RI Tr. 318). They sold coal mainly to the Tennessee Valley Authority (TVA) (J.A. 15a; RI Tr. 242, 290, 328-331, Tr. 180). As a further service to their lessees, Products and Consolidated furnished the performance bond required by the TVA (J.A. 15a; RI Tr. 290, 331-332).

[2] Citations to the record shall conform to the practice used by the parties in the Sixth Circuit; namely: "J.A." references are to portions of the record printed in a Joint Appendix. References to the transcript of testimony in the unfair labor practice proceeding are designated "Tr." and references to the exhibits in such proceeding are designated as follows: General Counsel's Exhibits—"GCX"; Tennessee Products Exhibits—"PX"; Sewanee's Exhibits—"SX". References to the records in the two representation proceedings which are part of the record herein (J.A. 65a, n. 2; Tr. 37-42) follow a similar pattern. References to the first proceeding are identified by the designation "RI", e.b., "RI Tr." or "RI GCX"; those to the supplemental proceeding are denoted "RII". References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

16a, 68a; R. I, Tr. 333-335, R. I, UMWX 2).[3] On behalf of its approximately 41 members, Sewance thereafter negotiated with UMW on a multi-employer basis in four negotiating sessions between September, 1962, and January, 1963. However, the parties were not able to reach an agreement (J. A. 17a, 68a; R. I, Tr. 129-130). In late December, 1962, the employees represented by UMW struck the members of Sewance, causing the members' mines to shut down (J. A. 68a; R. I, Tr. 335-338; R. II, Tr. 27).

In February, 1963, UMW filed a petition for certification as representative of the employees in the multi-employer bargaining unit comprised of the Sewance members (J. A. 14a, 69a; R. I, GCX 1(a)). Subsequently, the Southern Labor Union (SLU) filed petitions for separate single employer units of three Sewance members—Grundy, Stephenson Brothers Coal Company, Inc., and M. A. Payne, Inc. (J. A. 14a-15a, 69a; R. I, Tr. 14, R. I, GCX 1(b) (c) and (d)). Thereafter, following a consolidated hearing, the Board found that a multi-employer unit of the employees working for Sewance members was appropriate and directed an election therein (Appendix C, pp. A-84-A-92; J. A. 14a-21a, 69a). This decision was based on substantially undisputed evidence that the employers in question had bargained with UMW on a multi-employer basis for over ten years; that the employers had formed Sewance specifically for the purpose of dealing with UMW on a multi-employer basis; and that the employers were in fact bargaining with UMW on a multi-employer basis

[3] Products, Consolidated and Grundy Mining Company (a wholly owned subsidiary of Consolidated) sought membership in Sewance on condition that Sewance not bargain for them until the Board certified UMW as bargaining agent for the multi-employer unit (J.A. 18a-19a; RI Grundy X 1). This condition was later fulfilled when UMW won the election and was certified as bargaining agent for the employees in the multi-employer unit.

when the strike began and the petition for certification was filed (Appendix C, pp. A-84-A-92; J. A. 14a-21a).

The election in the multi-employer unit was held October 15, 1963 (J. A. 22a, 24a; R. II, GCX 1(a)). At the time of the election, Sewanee contended that only 12 of its members remained or intended to remain in business (J. A. 24a, n. 3; R. II, GCX 1(a)). The ballots of the employees of other members were challenged (J. A. 24a; R. II, GCX 1(a)). As there were enough challenged ballots to affect the results of the election, the Board ordered a hearing to resolve the issues raised by the challenges (J. A. 24a, 69a; R. II, GCX 1(a)).[4] The Board later broadened the scope of the hearing to include an inquiry into events occurring since the representation election which allegedly affected the multi-employer bargaining unit in substantial respects (J. A. 30a-31a, 53a, n. 2, 69a).

At the post-election hearing in June, 1964, the parties stipulated that a majority of the eligible voters participating in the election voted for the UMW (J. A. 36a-37a, 54a, n. 3-4; R. II, Tr. 7-8, 23-24). They also agreed that the challenged ballots should be opened and counted (J. A. 36a-37a, 54a, n. 3-4). On the basis of this stipulation and the tally of ballots, it was established that the UMW would be entitled to certification as the bargaining representative in the multiemployer unit of Sewanee members, provided the unit continued to be extant and appropriate (J. A. 36a-37a, 53a-54a).

Sewanee and Grundy contended that changes in the unit after the election had destroyed its existence. One change they cited was the dissolution of Sewanee, the multi-employer bargaining agent. On June 8, 1964, Sewanee's

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[4] Objections to the election were also filed, but these were ultimately overruled in their entirety (Appendix D, p. A-93; J. A. 24a-28a; RII GCX 1 (a)).

Board of Directors had adopted a resolution to dissolve the association and surrender its charter (J. A. 45a-46a, 70a; R. II, SX 2), and on June 10, 1964, its charter had been surrendered to the State of Tennessee (J. A. 45a; R. II, SX 1). In keeping with its established precedents, the Board found that the dissolution of Sewanee constituted an attempt to withdraw from a multi-employer unit at an inappropriate time and that since the existence of a formal association was not a prerequisite to the continuance of a multi-employer bargaining unit (J. A. 48a, 52a-54a), the dissolution of Sewanee as a corporate entity did not destroy the unit (Appendix E, pp. A-102–A-121).

Sewanee also argued that the multi-employer bargaining unit was no longer appropriate because many of its member operators had ceased operations after the Board made its unit determination and conducted the election. The Board concluded on the basis of evidence adduced in the post-election hearing that Products and Consolidated had not abandoned their efforts to have the southeastern Tennessee coal field mined (J. A. 82a). It found that in May, 1963, Consolidated had resumed operations through its wholly owned subsidiary, Grundy (J. A. 70a, 82a; R. I, Tr. 222-223, R. II, Tr. 43); and that a number of other individuals, who had wholly owned or controlled corporate members of Sewanee, had resumed operations as individuals or under corporate names different from those they had used previously (J. A. 41a-43a, 70a; R. II, Tr. 63-65, 97-98, 147, 151-152, 218-219). The Board took into account that the Sewanee group had expressed an intention to resume operations (J. A. 43a-44a, 70a; R. II, Tr. 166, 181-182). Since mere diminution of a multi-employer unit does not render the unit inappropriate, the Board concluded that the multi-employer unit continued to be appropriate. It also concluded that UMW's economic strike, which began in December, 1962, was responsible for the changed circumstances upon which the employers relied

in arguing that the unit was no longer appropriate (Appendix E, p. A-120, pp. A-121–A-123, J. A. 37a, 82a).

The record in the post-election proceeding reveals that several of the small operators, who had been members of Sewanee under one corporate name, had resumed operations as individuals or under different corporate names (J. A. 49a-50a; R. II, Tr. 63-65, 97-98; 147-151-152, 218-219). The Board, therefore, found (J. A. 49a-50a, 71a-72a) that it was "only fair and realistic" to consider:

> "an individual [who] had the sole or controlling interest in a corporation which was a member of Sewanee . . . rather than the corporation as the person constituting a part of the multi-employer group. Accordingly, where the individual forms another corporation and operates a new mine in the geographic area here involved, his employees should be treated as continuing to constitute a part of the multi-employer bargaining unit. By the same token, it should not be considered material for the purposes of this proceeding that a member of Sewanee is now operating, or will when the strike ends be operating, a mine in the same geographic area different from the one he operated prior to the strike."

To cover such contingencies and others, the Board modified its description of the unit to include (J. A. 51a, 95a; GCX 5):

> "all the production and maintenance employees of coal mining operators who were formerly members of Sewanee Coal Operators Association, including those not now operating but who resume operating old mines either before or after the conclusion of the strike, and including also those individuals who had sole or controlling interest in a corporation which was a member of Sewanee Coal Operators Association

who form another corporation and operate a new or different mine in the geographic area here involved."

On June 7, 1965, the Board certified UMW as representative of all the production and maintenance employees of the former Sewanee members in the foregoing unit (J. A. 55a-56a, 72a; GCX 4). Thereafter, on June 17 and July 19, 1965, the UMW sent letters to the former members of Sewanee and to their attorney unconditionally requesting bargaining (J. A. 75a-76a; Tr. 45 GCS 2(a)-2(NN), GCS 6(a)). None of the employers granted these requests (J. A. 76a; Tr. 48).

Based on charges filed by UMW, the General Counsel issued a complaint alleging that Products and the respondents had violated Section 8(a)(5) of the Act by refusing to meet and bargain with UMW, the certified bargaining agent of their employees. The Board concluded from the evidence at the unfair labor practice hearing that the multi-employer unit of the production and maintenance employees of the former members of Sewanee continued to be appropriate in spite of certain changes in the unit. Accordingly, the employers' refusal to meet or bargain with UMW was found to be a violation of Section 8(a)(5) and (1) of the Act, 167 NLRB No. 12 (J. A. 60a-61a, 99a-100a).

The order issued by the Board (J. A. 62a, 101a-103a) required the employers named to cease and desist from their unfair labor practices and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. Affirmatively, the order required all former members of Sewanee, who have resumed operations, to bargain with the UMW on request either jointly, or if mutually agreed upon, separately for a reasonable period but not less than one year and to embody any understanding reached in a signed agreement.

Thereafter in No. 18,357 Products sought review of the order and in No. 18,463 the Board sought its enforcement. Upon its application, UMW was granted leave to intervene in both cases, which were thereafter consolidated for hearing before the Court.

THE SIXTH CIRCUIT'S OPINION

In a 2-1 decision, Judge Edwards dissenting, the Sixth Circuit denied enforcement of the Board's order in its entirety. The Court held that the Board had erred in ruling that the multi-employer unit was appropriate because, in the majority's opinion (1) the withdrawal of the employers from the unit, "destroyed the consensuality needed to justify the **creation** and . . . **continuation** of a multi-employer unit"; and, second, that ". . . by the time the certification of the UMW as the exclusive bargaining agent of Tennessee Products and the other respondents was made on June 7, 1965, there was not in existence a legitimately identifiable multi-employer unit which could be required to bargain with the UMW" (Appendix A, p. A-20; emphasis added).

REASONS FOR GRANTING THE WRIT

I

The Sixth Circuit Erred in Holding That Employers Could Unilaterally Withdraw From a Multi-Employer Unit, and Thereby Destroy the Existence of the Unit, After the Start of Collective Bargaining.

The Sixth Circuit held that the employers who had formed an association to bargain on a multi-employer basis could unilaterally withdraw from the association (and thereby destroy it) even after bargaining had begun, an economic strike had started and the UMW had filed a petition for certification. This holding conflicts

with previous decisions of the Sixth Circuit itself, **Detroit Newspaper Publishers Association v. NLRB**, 372 F. 2d 569, 572 (C. A. 6), **Universal Insulation Corp. v. NLRB**, 361 F. 2d 406, 408 (C. A. 6), with a decision of the Tenth Circuit, **NLRB v. Southwestern Colorado Contractors Ass'n.**, 379 F. 2d 360 (C. A. 10), and with a decision of the Second Circuit, **NLRB v. Sheridan Creations, Inc.**, 357 F. 2d 245, 247 (C. A. 2). It also conflicts with national labor policy.

In **Detroit Newspaper Publishers Association v. NLRB**, supra, 372 F. 2d at 572, the Sixth Circuit recognized that "Board policies should be framed substantially to bolster the multi-employer unit as an instrument of national policy . . . [and that], underlying the entire statutory scheme which has been interpreted to authorize such arrangements, is the notion that they serve the important public interest in these matters as well as the interests of the immediate parties". **Detroit Newspapers Publishers Association v. NLRB**, supra, 372 F. 2d at 572. In **Universal Insulation Corp. v. NLRB**, supra, 361 F. 2d at 408, the Sixth Circuit cited this Court's language in **NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen Supply Co.)**, 353 U. S. 87, 95, that "multi-employer bargaining is a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining". It is clear, therefore, that multi-employer bargaining is an integral and important part of national labor policy.

The decision of the Sixth Circuit seriously jeopardizes this form of bargaining by holding that the members of the multi-employer association may unilaterally withdraw from the unit—and thereby destroy it—after the commencement of bargaining.

The facts relevant to this question can be stated very briefly. The employers in question, some 33 in all, volun-

tarily formed an association, Sewance, to bargain with UMW on a multi-employer basis. (As noted, the parties had engaged in multi-employer bargaining throughout the preceding twelve years on a somewhat less formal basis.) Sewance and UMW bargained on four occasions between September, 1962, and January, 1963, but they could not agree on a contract. In December, 1962, the employees represented by UMW commenced a strike and in February, 1963, UMW filed a petition for certification as bargaining representative for employees in the multi-employer unit. It was following all of this that the employers attempted to withdraw.

The Sixth Circuit recognized the well established rule that an employer's withdrawal from a multi-employer unit is untimely if it occurs after the start of bargaining. But the Court held that under what it termed the "unusual circumstances" of this case, the employers could in effect withdraw at any time. It does not take an extended analysis to show that multi-employer units are completely deprived of their stability and effectiveness if employers can singly or jointly decide to withdraw from the unit at any time.

The decision of the Second Circuit in **NLRB v. Sheridan Creations, Inc.**, 357 F. 2d 245, 247-248, speaks clearly to this question:

> "The Board's rule . . . that withdrawal from a multi-employer unit is untimely, absent union consent, once negotiations on a new contract have started, seems to us logical . . . to permit withdrawal after negotiations commence might well lead to a breakdown of the unit. Withdrawal would be restricted to the period before negotiations to assure that this is not used as a bargaining lever.
>
> "Multi-employer bargaining is based on the consent of the parties to treat with one another through the

> agreed units. A shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process . . . the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun."

The "unusual circumstances" exception carved out by the Sixth Circuit has the effect of undercutting the entire concept of multi-employer bargaining. For if the law permits employers to jointly or singly withdraw from a multi-employer unit after negotiations have started, the principle of multi-employer bargaining has lost all of its vitality. This of course is why the Board and the courts have held consistently that withdrawals cannot be effected unilaterally after the commencement of bargaining.

The only "unusual circumstances" presented by this record is the decision of the employers in the unit to revoke their consent to bargain on a multi-employer basis and to withdraw from Sewanee. The important fact is that this occurred **after** UMW had been recognized by the multi-employer unit; **after** the negotiations had begun; **after** the employees in the unit had struck; and **after** UMW had filed a petition for certification as representative of the employees in the multi-employer unit. Under the Sixth Circuit's decision employers can withdraw from a multi-employer unit at any time if they conclude that the negotiations are not going to produce an agreement satisfactory to them. The principle of labor peace is dealt a near fatal blow by such reasoning, as this case so clearly illustrates.

UMW believes that the writ should be granted because the issue of when employers may withdraw from a multi-employer unit has a significant bearing on national policy; and for the further reason that the decision of the Sixth Circuit in this case is in direct conflict with decisions of other circuits and the Board.

II

The Sixth Circuit Exceeded the Permissible Limits of Judicial Review When It Held That the Board Had Erred in Finding Appropriate a Multi-Employer Unit of Coal Companies Which Had Voluntarily Undertaken to Bargain on a Multi-Employer Basis With the UMW.

The Sixth Circuit's denial of enforcement of the Board's order conflicts squarely with the decisions of this Court in **Packard Motor Car Co. v. NLRB**, 330 U. S. 485, and **NLRB v. Teamsters Local 449**, 353 U. S. 87.

In **Packard**, this Court held that decisions of the Board relating to the appropriateness of a bargaining unit are subject to an extremely limited judicial review:

> "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, our power is at an end."

And in **NLRB v. Teamsters Local 449**, supra, at page 96, essentially the same principle was expressed in regard to Board decisions pertaining to multi-employer units.

> "[T]he compelling conclusion is that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future."

> "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

In holding that the Board had erred by certifying UMW as bargaining agent for the employees in the multi-employer unit, the Sixth Circuit disregarded the guidelines laid down in the **Packard** and **Teamster** cases.

The basic question at issue was whether the multi-employer unit was still appropriate in 1965 when UMW was certified as bargaining agent. In 1963, when the petition for certification was filed, Sewanee had some 33 members who were engaged in coal mining in the southern Tennessee coal fields; in 1965, when the certification issued, approximately twelve operating companies remained in the unit.[5] Based on the evidence adduced at the hearing, in 1964, the Board concluded that the multi-employer unit was still appropriate, because, under established precedent, a diminution in the number of companies does not destroy the appropriateness of the unit. See, for example, **Puerto Rico Steamship Association**, 116 NLRB 418; **International Restaurant Associates**, 133 NLRB 1088.

The Sixth Circuit did not disagree with the findings of fact upon which the Board reached its decision, or at least enforcement was not denied on that basis; rather, the Court simply disagreed with the discretion exercised by the Board in holding that the unit was still appropriate and that the employers should be required to bargain with UMW. The Court held that in June, 1965, ". . . there was not in existence a legitimately identifiable multi-employer unit which could be required to bargain

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[5] The delay between the election and certification was caused by a series of post-election proceedings instituted by the employers.

with UMW[6] (Appendix A, page A-20). Whether or not there existed what the Sixth Circuit called a "legitimately identifiable multi-employer unit" is precisely the kind of question which Congress entrusted to the specialized judgment of the Board. It is clear, we think, from the **Packard** and **Teamster** cases that the Court of Appeals is not empowered to merely substitute its judgment for that of the Board, particularly in complicated cases of this type; nor is it empowered to second guess the Board in striking the balance which best effectuates national labor policy, in regard to the appropriateness of a multi-employer unit. But that is precisely what the Sixth Circuit did.

For instance, the Court said that the Board's determination and orders were not calculated to achieve effective bargaining or industrial peace.

> "In this case the Board's determinations and orders have led to neither effective bargaining nor industrial peace; neither, in our view, were they calculated to serve these ends. The Board's attempt to sanction the creation and perpetuation of a UMW hegemony in southeastern Tennessee, therefore, cannot stand unquestioned" (Appendix A, p. A-18).

What the Court failed to consider in this regard is that the lack of effective bargaining had resulted solely because the employers had adamantly refused to meet and bargain since the issuance of the certification.

The Court dwelled at some length on the theme that Board's order unfairly sanctions what was described as

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[6] The Court did not explain what it meant by "legitimately identifiable unit"; but in any case there was no doubt as to the identity of the companies who were operating in the three county area in question at the time the certification was issued. Nor is there any doubt today about the companies who fall within the certified unit.

"the creation and perpetuation of a UMW hegemony in southeastern Tennessee."

> "We read the end product of the long procedure herein reviewed as a command by the NLRB that no enterprise which, at the beginning of the UMW strike of December 26, 1962, was a member of or had authorized the Sewanee Association to bargain for it, shall ever again mine coal in the State of Tennessee without first bargaining with the United Mine Workers.
>
> "We are not persuaded that a mining operation whether carried on as a sole proprietorship, as a member of a partnership, or in corporate form, and whose business was destroyed by the strike and such operator's inability to meet the terms of the UMW proffered contract should be closed out of ever re-entering the mining business except on the UMW terms" (Appendix A, p. A-13).

And finally, although the record contained nothing relating to antitrust matters or other litigation arising out of the same area, the Court said:

> "We have had numerous occasions to consider the great power of the United Mine Workers in the coal fields of Tennessee. This power was greatly enhanced by the dealings between the UMW and the big mining companies acting together as the Bituminous Coal Operators Association. Wholly apart from whether the UMW illegally conspired with the BCOA, it was the aim and purpose of the UMW to require that anyone attempting to mine coal in southeastern Tennessee do so only by signing and living up to the terms of the National Bituminous Coal Wage Agreement of 1950 as supplemented by the 1958 Protective Wage Clause" (Appendix A, p. A-14).

These passages, which contain both overstatements and misstatements,[7] strongly suggest that the Court felt it was unwise and unfair from an economic standpoint to require coal operators in the unit to bargain with UMW. This is further evidenced by other statements in the Court's opinion, such as: "We draw a justified inference that the only contract that the United Mine Workers would consider was the National Bituminous Wage Agreement of 1950, as amended by the Price Wage Clause of 1958" (Appendix A, p. A-3). And at another point where the Court said: "This conclusion was expressed notwithstanding the Board's knowledge that, following the start of the strike and the **UMW's intransigent insistence that only its then standard contract would be accepted** . . ." (Appendix A, p. A-5; emphasis added).

Whether or not the Court considered economic factors in reaching its decision, the fact is that the Court did exceed the kind of limited review required by the **Packard** and **Teamster** cases. Indeed, it would appear that instead of deferring to the Board's expertise in this area, the Court conjured up from both within and without the record every conceivable reason for not granting enforcement. The upshot was that the Court substituted its judgment for that of the Board.

As the dissenting opinion points out, the employees had bargained with UMW on a multi-employer basis for over ten years before this proceeding was started; thereafter, these employers voluntarily formed Sewanee to bargain with UMW on a multi-employer basis; and, indeed, these

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[7] It is a misstatement to say that multi-employer unit was state wide in scope. To the contrary, it included only those operators in a three county area who had traditionally joined together to bargain on a multi-employer basis. It likewise is a misstatement to say that the order closes out persons from ever reentering the mining business "except on UMW terms". What the order does and all it does is require collective bargaining. It does not compel agreement of any sort.

same employers bargained with UMW on a multi-employer basis both before and after the start of the strike in 1962. Under these circumstances, it can scarcely be said that the certification of UMW as bargaining agent of the employees in the multi-employer unit was so unreasonable and arbitrary as to exceed the Board's authority.

The Sixth Circuit's decision, and the rationale used to reach it, manifests a plain misapplication of the principles of the **Packard** and **Teamster** cases. UMW believes, therefore, that the writ should be granted to make clear once again the limited scope of the court's authority to review decisions of the Board on questions relating to the appropriate units under Section 9(c) of the National Labor Relations Act.

CONCLUSION

For the reasons assigned, petitioner prays that the petition for writ of certiorari should be granted and that the writ issue to review the judgments as aforesaid.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
for the Sixth Circuit

Nos. 18,357 and 18,463

Tennessee Products & Chemical Corporation,
Petitioner

v.

National Labor Relations Board,
Respondent
and
United Mine Workers of America,
Intervenor

National Labor Relations Board,
Petitioner

v.

Basham Coal Company, et al.,
Respondents
and
United Mine Workers of America,
Intervenor

Decided March 5, 1970

Opinion

Before O'Sullivan, Edwards and Peck, Circuit Judges.

O'Sullivan, Circuit Judge. In No. 18,357, Tennessee Products & Chemical Corporation seeks review, and in No. 18,463 the National Labor Relations Board seeks enforce-

ment of, a decision of the National Labor Relations Board whereby petitioner, Tennessee Products and respondents Basham Coal Company, et al., were found guilty of violating Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 USC §§ 158(a)(1) and (5), by refusing to bargain with the United Mine Workers of America through the agency of a multi-employer unit constructed by order of the NLRB. In addition, respondents H. Willis Flynn, d/b/a Poplar Coal Company (Poplar), and Sycamore Coal Company (Sycamore), were found guilty of violating Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), by entering into contracts with the Southern Labor Union which had not been certified as the bargaining agent of their employees. The opinion and order of the Board is No. 12 in Volume 167 NLRB.

We deny enforcement of the Board's order.

Alleged violations of Sections 8(a)(1) and (5).

I.

Recital of the facts and the prior proceedings is necessary because of the unusual nature of this case. It grows out of the labor strife that has so long beset southeastern Tennessee coal lands. Prior to 1962, Tennessee Products and Chemical Corporation (Tennessee Products) and Tennessee Consolidated Coal Company (Tennessee Consolidated) were the dominant interests in the area here involved; both had actively operated coal mines and leased portions of coal lands controlled by them to independent operators.

Tennessee Products and Tennessee Consolidated, with other mine operators in the area, had, prior to 1962, bargained with the United Mine Workers through an organization known as the Southern Tennessee Coal Producers

Association. The contract negotiated by this association in 1958 expired in October, 1962. In September of 1962, various operators in the area formed the Sewanee Coal Operators Association, Inc. (Sewanee). Sewanee's charter stated that it was incorporated for a purpose, among others, of acting as the exclusive bargaining agent for its members. Neither Tennessee Products, Grundy Mining Company, nor Tennessee Consolidated became formal members of Sewanee. Instead they made application for membership subject to the condition that Sewanee not negotiate for them unless and until the UMW had been duly certified as bargaining agent for their employees.

Negotiations between Sewanee and the UMW commenced in September, 1962. Between September and December, 1962, there were four bargaining sessions between UMW and the Sewanee group. We draw a justified inference that the only contract that the United Mine Workers would consider was the National Bituminous Wage Agreement of 1950, as amended by the Price Wage Clause of 1958. This was the contract that had been made between the Bituminous Coal Operators Association, an association of the operators of the big mechanized mines in Tennessee, and the United Mine Workers. This contract was the subject of several suits against the Mine Workers charging violation of the Sherman Act. See *Ramsey v. United Mine Workers*, 265 F. Supp. 388 (D.C. E.D. Tenn. 1967) affirmed 416 F(2) 655 (6th Cir. 1969); and *Tenn. Consolidated Coal Co., et al. v. United Mine Workers*, 416 F(2) 1192, (6th Cir. 1969).

The negotiations between the Sewanee group and the UMW were fruitless; and on December 26, 1962, the Mine Workers called a strike throughout the involved coal fields. The mines of all the respondents, as well as those of Tennessee Products, were shut down. Most of these mine enterprises have gone out of business.

II.

In February, 1963, following the start of the strike, United Mine Workers filed a petition with the Regional Director to have that union certified as the bargaining representative of the employees of all the members of Sewanee Coal Operators Association as well as the employees of Tennessee Products and Grundy Mining Company, all of which employers to be required to bargain with the UMW as a single multi-employer unit. Success in this endeavor would give the UMW exclusive bargaining rights for the employees of some forty-three different mine operators, regardless of the wishes of a majority of the employees of any single enterprise. On May 23 and June 6, 1963, the Southern Labor Union (SLU) filed with the Board petitions seeking elections in separate and single-employer units consisting of the employees of Grundy Mining Company, Stephenson Brothers Coal Company, Inc., and M. A. Payne, Inc. Grundy Mining was the largest single employer involved. The Sewanee Association requested that bargaining agents for employees of each of its members be determined by election in individual employer units. Grundy Mining Company requested that it be considered a separate unit for any certification election. It is clear, therefore, that at the time the Board first considered the propriety of constructing a multi-employer unit, it was fully aware that every employer involved was opposed to it. It knew also that a union competing with the UMW was asserting that it represented a majority of the employees of three separate employers. The Board's own decision asserts its awareness of these facts.

The Board's decision also discloses its recognition that law and its own policy required that *intent* by the involved employers to form such a multi-employer unit was essential to its creation. The Board said:

> "The test is whether the *employer parties* have manifested *an intent* to be bound by group rather than individual action." (Emphasis supplied.)

The Board, on September 30, 1963, ordered that an election be held among the employees of all of the mine operators here involved, tied together into a single multi-employer unit. The Board's asserted justification for this resides in the fact that in earlier years there had been some multi-employer bargaining and the shortlived effort by mine operators to deal with the UMW through the Sewanee Association.

It is the Board's position that no new *intent* could be arrived at after the strike had commenced. Thus, the Board reasoned:

> "The bargaining history also reflects that the intent on the part of the companies to bargain on a multi-employer basis *is a continuing one.*"

This conclusion was expressed notwithstanding the Board's knowledge that, following the start of the strike and the UMW's intransigent insistence that only its then standard contract would be accepted, all of the operators involved repudiated such multi-employer bargaining.

Pursuant to the Board's order of September 30, an election was held on October 15, 1963. Canvass of the voting disclosed that 579 ballots were cast, of which 108 were for UMW, 50 for the Southern Labor Union, and 421 ballots were challenged. Prior to the election there were only 280 employees of employers in the Sewanee Association listed as eligible to vote and Grundy had listed 155 of its employees as eligible to vote. It is clear that the number of votes cast substantially exceeded the total listed as eligible to do so. While the record is silent on the matter, it may be that some, or all, of the mine operators who had gone out of business after the December 26, 1962, strike did not

send in eligibility lists, but their former employees voted nevertheless.

Prior to the Board's decision of September 30, and the election of October 15, the Grundy Mining Company which had been the biggest operator prior to the strike, attempted to resume operations employing members of the Southern Labor Union. These employees attempted to organize a local union made up of members of the Southern Labor Union working for Grundy. Such activities brought on spectacular violence and terrorism by members of UMW. This violence was described in, and was the subject of, two decisions of the Board finding the UMW guilty of such conduct. See *United Mine Workers Local No. 7083 (Grundy Mining Company) and Southern Labor Union,* 146 NLRB 176 (1964), and *United Mine Workers of America, Local No. 7244 (Grundy Mining Company) and Southern Labor Union,* 146 NLRB 244 (1964).

After the report of the election, Grundy and SLU filed timely objections with the Regional Director charging that the conduct of the Mine Workers had made a fair election impossible. The Regional Director, sustaining objections in such regard, found that the previous violence of the UMW and the conditions that surrounded the voting area on the day of the election prevented a free choice by the voters. He said:

> "However, in the opinion of the undersigned, the pictorial evidence submitted during the investigation depicting the crowd massed at the entrance to the polling place and the placard electioneering by unidentified persons in behalf of the UMW in the area immediately outside the polls and in close proximity to the voters waiting in line coupled with the background of violence hereinbefore described was sufficient to create an atmosphere of fear and confusion at the polls which raises substantial and material issues regarding the results of the election."

After the foregoing, and other recitals, the Regional Director recommended that:

> "For this reason, the election should be set aside and a new election directed, subsequent to the hearing hereinafter recommended."

The hearing thereafter recommended by the Regional Director was "to resolve the issue raised by the 421 challenged ballots." His recommendations also contain the recital that the "Board agent challenged 379 persons whose names were not on the eligibility list furnished by the employer" and further set out that,

> "As a result of the strike, certain members of Sewanee ceased operations either temporarily or permanently, whereas others continued operations. As a result the persons who voted in the election consisted of working employees, strikers, replacements and laid off employees."

His recommendations reported that the Sewanee Association had contended that only 11 of its former members "intend to remain in business" and that some 21 of the involved former mine operators had "permanently ceased operations prior to the elections" but that their former employees nevertheless voted at the election. These considerations led, then, to his recommendation that,

> "a hearing before a Trial Examiner of the Board be directed to resolve the issues raised by the 421 challenged ballots herein."

The foregoing Report and Recommendations of the Regional Director were filed on December 17, 1963. Thereafter, on December 23, 1963, Sewanee, apparently assuming that a new election would be held, as recommended by the Regional Director, requested that the Board "spell out the names of the coal companies in business whose employees were entitled to vote as members of Sewanee."

On April 28, 1964, the Board issued a supplemental Decision and Order, reported as *Sewanee Coal Operators Association, Inc.*, 146 NLRB 1145 (1964) in which it refused to follow the Regional Director's recommendations that the election be set aside. The Board thought that the April and May, 1963 mob threats and violence of which it convicted the UMW "could have no substantial impact on voter free choice in the election." The Regional Director's report stated that during the election,

> "a large number of persons, including strikers, non-strikers, replacements and others congregated on the sidewalk and stood immediately outside the polling place before and during the polling period."

and that,

> "the crowd was estimated to number from 200 to 2000 at various times, with a line of voters four to six feet deep extending from the polling place down the sidewalk for a block or more. While the polls were opened, several unidentified persons circulated about the voting line outside the polling place wearing placards reading 'VOTE FOR UNITED MINE WORKERS AND BE ABLE TO GET A PENSION.'"

Disagreeing with the Regional Director, the Board said:

> "The Regional Director based his finding concerning crowding upon pictorial evidence submitted during investigation. However, he does not point to any specific incidents of disorderliness or coercive conduct but merely couples the evidence of electioneering and crowding immediately outside the polling place with the much earlier incidents of strike violence which we have found to be too remote to have an effect upon the election."

Disposing of all of the employer objections to the report of the election, the Board concluded,

> "In view of the foregoing, we hereby overrule the objections in their entirety."

Thereafter, on May 11, 1964, Grundy Mining filed a petition for reconsideration and motion to reopen the record. Once again it requested the Board to determine the bargaining agent of its employees independently of all other employers and to consider further misconduct of the UMW occurring after the election of October 15, 1963. This motion was denied by the Board's order of June 11, 1964, which order, however, expanded the matters to be considered at the hearing which had been initially set up to consider only the 421 challenged ballots:

> "IT IS FURTHER ORDERED that, to the extent that the facts alleged may effect the disposition of the challenges, or to the extent that alleged events occurring after the election relate to changes in the composition, *or the continued existence of, the unit found appropriate,* the scope of the hearing set for June 16, 1964, is broadened to permit the introduction of such evidence." (Emphasis supplied.)

Thus, the propriety of putting into one multi-employer unit all of the involved mine operators was reopened in June of 1964 for reconsideration in the light of events occuring after the election. This hearing commenced on June 16, 1964, before Trial Examiner Fannie M. Boyls. Prior to that date the Sewanee Coal Operators Association had formalized its position that it was not in existence as a multi-employer group by surrending its charter to the State of Tennessee and terminating its corporate existence.[1]

At the June, 1964, hearing it was again made clear that all of the mine operators who would be affected

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[1] The Resolution to dissolve contained a paragraph reading:
"WHEREAS, there remains only four (4) companies of said Association who have not received cancellation, being Thomas Coal Co., Leon Nunley Coal Co., Marshall Meeks Coal Co., and Easy Coal Co., all others having been cancelled; and it further appearing that the entire purpose of said Association had been voided * * *."

by being included in a multi-employer unit were opposed to it. Petitioner Tennessee Products had early advised that it had ceased all mining operations and would not reenter the business. Grundy Mining Company expressed its desire to carry on its operations with members of the Southern Labor Union. The Board knew of the violence wrought upon Grundy by the UMW for Grundy's attempt to so operate and had properly denounced it in earlier decisions. Such was the situation when the hearing commenced before Trial Examiner Boyls on June 16, 1964. The testimony taken confirmed and corroborated employers' opposition to a multi-employer unit by every employer concerned. While there is some confusion as to whether the respondents had so stipulated, the Board found that a majority of the votes cast at the October 15, 1963, election were for the UMW. There is no way of telling how the employees of any single employer voted. We need not further consider the matter of the 421 challenged ballots.

The Southern Labor Union, obviously speaking for employees of Grundy, opposed being included in such a unit. The testimony showed that the majority of the onetime members of Sewanee went completely out of business following the strike of December 26, 1962, and at the time of hearing had no prospects of returning. At most, only 12 companies, originally considered as members of the appropriate unit by the Board, evidenced any intent to continue, or resume, mining operations. That the trial examiner knew all of this is exhibited by various observations, such as:

> "The fact that many of them [formerly members of the then defunct Sewanee] because of heavy financial losses suffered during the strike or because the mines which they had been operating are no longer operative, expressed the view that they will not be financially able to resume their business as operators if

and when the strike is settled, does not, in my view, warrant a finding that the multi-employer unit no longer exists or is inappropriate."

Further, she said:

"Accordingly, despite the testimony of some of the operators that they have no present intention of resuming the business of operating coal mines, I am convinced that some of those so testifying will find the means of again opening their old mines or other mines in that area, and that they will continue to feel the need of collective strength in bargaining with the representative of their employees as they did when they joined Sewanee."

Trial Examiner Boyls made specific findings that some nine former members of Sewanee went out of business because their leases had been cancelled, and set out that some thirteen others were clearly out of business without prospects of reentering. But the examiner concluded the matter by stating:

"The multiemployer bargaining unit heretofore found by the Board to be appropriate was described in the Decision and Direction of Election as comprising the production and maintenance employees of all members of Sewanee, but in view of the fact that Sewanee in its corporate form has dissolved since the UMW won the election, the multi-employer unit is now more accurately described as comprising the production and maintenance employees of those coal mining operators who were formerly members of Sewanee. It is accordingly recommended that the Board certify the UMW as the collective bargaining representative of all the production and maintenance employees of coal mining operators who were formerly members of Sewanee, including those who are not now operating but who resume the business of operating coal mines

at the end of the strike or before the conclusion of the strike."

Her decision came down on September 29, 1964, (reported as *Sewanee Coal Operators Association, Inc.*, 152 NLRB 663). The Board affirmed this decision on May 17, 1965, expressing its view that the appropriate unit included not only former members of Sewanee Coal Operators Association who were still in business, but also,

> "those not now operating but who resume operating old mines either before *or after* the conclusion of the strike, and including also those individuals who had sole or controlling interest in a corporation which was a member of Sewanee Coal Operators Association who form another corporation and operate a new or different mine on the geographic area here involved." (Emphasis supplied.)

A certification consistent with the May 17 decision was issued on June 7, 1965. The UMW, in July, 1965, made a demand upon all the respondents and Tennessee Products to bargain with them. No response was made to these demands and on November 1, 1965, charges of refusal to bargain were filed by UMW. Amended charges were filed in March of 1966, and on April 8, 1966, the complaint here involved was issued. Hearing on this complaint was had in September of 1966 and a decision of a trial examiner finding all respondents and petitioner Tennessee Products guilty of violations of Sections 8(a)(1) and (5) of the Act came down on March 28, 1967. The Decision and Order of the Board affirming its Trial Examiner came down on August 22, 1967. The Trial Examiner's recommended order, adopted by the Board, commanded that some 43 concerns, excluding as an entity the defunct corporate association Sewanee,

> "Take the following affirmative action which it is found will *effectuate the policies of the Act:*

"(a) Upon request, bargain collectively with United Mine Workers of America as the exclusive bargaining representative of employees in the appropriate unit set forth hereinabove, jointly together with the other Respondents (except Sewanee and New Floyd), or together with other persons within the description of the appropriate unit, or separately, as may be mutually agreed upon between the Respondents, or any of them, and the UMW, for a reasonable period, but not less than 12 months, and if an agreement is reached, embody such understanding in a signed agreement." (emphasis supplied.)

III.

The above Decision and Order of August 22, 1967, entered just under five years after commencement of the strike, presented the first opportunity for any employer to obtain judicial review of its inclusion in the multi-employer group. Presumably there has been no bargaining between such a multi-employer unit and the United Mine Workers since the strike of December 26, 1962. We read the end product of the long procedure herein reviewed as a command by the NLRB that no enterprise which, at the beginning of the UMW strike of December 26, 1962, was a member of or had authorized the Sewanee Association to bargain for it, shall ever again mine coal in the State of Tennessee without first bargaining with the United Mine Workers.

We are not persuaded that a mining operation whether carried on as a sole proprietorship, as a member of a partnership, or in corporate form, and whose business was destroyed by the strike and such operator's inability to meet the terms of the UMW proffered contract should be closed out of ever re-entering the mining business except on the UMW terms.

We have had numerous occasions to consider the great power of the United Mine Workers in the coal fields of Tennessee. This power was greatly enhanced by the dealings between the UMW and the big mining companies acting together as the Bituminous Coal Operators Association. Wholly apart from whether the UMW illegally conspired with the BCOA, it was the aim and purpose of the UMW to require that anyone attempting to mine coal in southeastern Tennessee do so only by signing and living up to the terms of the National Bituminous Coal Wage Agreement of 1950 as supplemented by the 1958 Protective Wage Clause. Paragraph A of this Wage Clause provided:

> "A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

In the case of *Tennessee Consolidated Coal, et al. v. United Mine Workers,* 416 F(2) 1192 (6th Cir. 1969), recently announced by this Court, and dealing with the Mine Workers' seeking complete control of mining in southeastern Tennessee, Judge Weick observed:

> "The record contains an admission by counsel for UMW that the PWC [the Price Wage Clause contained in the contract between UMW and the Bituminous Coal Operators Association] was a 'quid pro quo.' Paragraph A was demanded by BCOA. Para-

graph B, containing the promise of the signatory operators, was demanded by UMW. In this paragraph, the operators agreed to boycott coal not produced in conformity with the national agreement. UMW faithfully complied with Paragraph A in all collective bargaining agreements which it entered into. UMW struck operators who refused to agree to the national contract. The record in *Ramsey* is replete with evidence of mass picketing, force and violence." 416 F(2) at 1198.

The *Ramsey* case referred to in this quotation is reported as *Ramsey v. United Mine Workers*, 265 F. Supp. 388 (E.D. Tenn. 1967), aff'd en banc by equal division of this Court in *Ramsey, et al. v. United Mine Workers*, 416 F(2) 655 (6th Cir. 1969). That case covered substantially the same period of the violent history of coal mining in southeastern Tennessee. Concerning this period, Judge Wilson said:

> "In the period since 1960 the coal operators in the Southeastern Tennessee coal field have been unable to compete and survive in the T.V.A. coal market under the National Bituminous Coal Wage Agreement. While in many instances this appears to have been due to antiquated mining methods and equipment or other causes, the fact nevertheless remains that since 1960 there has not been a single instance of a successful coal mining operation in the Southeastern Tennessee coal field under the National Bituminous Coal Wage Agreement and this in spite of the fact that the *only feasible alternative facing most coal operators in the area was to operate under the national contract or go out of business.*" 265 F. Supp. at 430. (Emphasis supplied.)

From a reading of the record here and from other cases such as *Gibbs v. United Mine Workers of America*, 343

F(2) 609 (6th Cir. 1965), *reversed, Mine Workers v. Gibbs*, 383 U. S. 715 (1966), it is clear that the only labor organization that attempted to compete with the Mine Workers was the Southern Labor Union. The few mine operators who tried to operate without signing the Uniform National Bituminous Coal Wage Agreement of 1950 with the Protective Wage Clause of 1958, tried to do so without union men or with members of the Southern Labor Union. The grave and spectacular violence that attended these efforts is set out with particularly in *United Mine Workers of America v. Local No. 7083, (Grundy Mining Company) and Southern Labor Union*, 146 NLRB 176 (1964), *United Mine Workers of America, Local No. 7244, (Grundy Mining Company) and Southern Labor Union*, 146 NLRB 244 (1964). In both of these cases the United Mine Workers were convicted of the violence charged.

Grundy Mining did attempt to operate independently of, and during the hegemony of the UMW. One Paul Gibbs who had attempted to open a mine, using members of the SLU as his employees, was the object of violence employed by members of the United Mine Workers in the case *Gibbs v. United Mine Workers of America*, 220 F. Supp. 871 (E. D. Tenn. 1963). On review, our affirmance of the *Gibbs* decision was reversed upon a holding that there was not *clear proof* that the UMW, as an entity, was responsible for the violent depredations of its members. *Mine Workers v. Gibbs*, 383 U.S. 715. In *Ramsey*, District Judge Wilson described the events that followed the strike here involved and which is claimed to be still in progress.

> "With respect to the strike which occurred on December 26, 1962, and which has been in effect since that date, the evidence is clear * * * that the strike has been accompanied by much mass picketing, violence and property destruction. Both sides in the dispute have suffered the effects of such violence,

but the operators and those miners who sought to cross the picket lines have suffered much the worse of the violence. Without attempting to itemize the record, it may be said that homes were shot into, burned or dynamited by unidentified assailants. Coal was dumped upon the highway. Trucks and cars were fired upon numerous times. Power poles and mine equipment were dynamited. Coal tipples were burned and mine guards were fired upon. Operators were forced to abandon their mines and equipment for reasons of personal safety, with the mines and equipment suffering heavy losses from mine flooding and vandalism. Several men were killed. One intrepid operator was the intended victim of dynamite thrown into his yard from a speeding car, but he seized the lethal bundle and removed the cap just seconds before it went off. While it certainly adds no luster to the occasion, there were victims to violence upon both sides. The home of the U.M.W. District Representative was damaged by dynamite. Four local union halls were burned. Union men were shot at and union homes were burned." 265 F. Supp. at 429.

IV.

The law is clear that it is within the Board's power to put together a so-called multi-employer group and certify the union which will be the exclusive bargaining agent for the employees of all the employers within the multi-employer group. In *NLRB* v. *Truck Drivers' Union*, 353 U.S. 87, 1 L. Ed(2) 676 (1957), the Supreme Court said:

> "[T]he compelling conclusion is that Congress intended 'that the Board should continue its established administrative practice of certifying multiemployer units, and intended to leave to the Board's specialized

judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.'" 353 U.S. at 96.

The power of the Board to order multi-employer bargaining does not derive from statutory enactment. Instead, it is permitted as an instrument of the National Labor Board's policy and duty — the promotion of industrial peace through effective bargaining. The validity of the Board's exercise of power in any given circumstance depends, then, upon whether it will effectuate the purposes of the Act. In this case the Board's determinations and orders have led to neither effective bargaining nor industrial peace; neither, in our view, were they calculated to serve these ends. The Board's attempt to sanction the creation and perpetuation of a UMW hegemony in southeastern Tennessee, therefore, cannot stand unquestioned.

The multi-employer unit is a creature based, at its inception, on consent of employees *and* their employers. *NLRB* v. *Local 210, International Bhd. of Teamsters*, 330 F(2) 46 (2nd Cir. 1964). In *NLRB* v. *Sklar*, 316 F(2) 145 (6th Cir. 1963), we said:

> "Membership of an employer in a multi-employer unit is wholly voluntary. The unit can only be created with the consent of the employers. The Board may not force any employer to join a multi-employer unit or prevent him from exercising his right to withdraw therefrom at an appropriate time. The fact that MAD had been a member of a multi-employer unit did not consign it to that status forever. The Board has recognized that an employer may withdraw from the multi-employer unit provided that it clearly evinces at an appropriate time its intentions of pursuing an individual course in bargaining." 316 F(2) at 150.

In *Universal Insulation v. NLRB*, 361 F(2) 406 (6th Cir. 1967), we held that under the special *facts of that case*

one employer's attempt to withdraw from a multi-employer unit, after that unit had begun bargaining and had arrived at a contract with a union, was untimely. We there referred to several NLRB cases and *NLRB v. Sheridan Creations, Inc.*, 357 F(2) 245 (2nd Cir. 1966) which appeared to announce a *per se* rule that an employer's withdrawal is untimely after bargaining has begun except on mutual consent. The Board relies on our decision in *Insulation* and that of the Second Circuit in *Sheridan*. However, the Second Circuit in *NLRB v. Spun-Jee Corporation*, 385 F(2) 379 (2nd Cir. 1967) made clear that the *per se* rule of *Sheridan* would yield to *unusual circumstances*. Such is the view of the Tenth Circuit, see *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F(2) 55 (10th Cir. 1966), and the Board, itself, see *Retail Associates, Inc.*, 120 NLRB 388, 395 (1958). Here we are not dealing with individual withdrawals of members from a multi-employer unit. If there came into being such a unit, lasting for the short period of the abortive negotiations with the UMW, such unit was completely destroyed by the unusual circumstances outlined at length in this opinion.

Furthermore, it is doubtful that Grundy Mining ever became a member of the multi-employer group. Its membership in Sewanee was conditioned upon a choice by its employees of the UMW as their bargaining agent. Such condition was never, under our view, fulfilled. Additionally, the request by the Southern Labor Union for a separate election for the Grundy employees made clear that such employees did not *intend* to be part of a multi-employer unit. In *NLRB v. Local 210 Internat'l Bhd. of Teamsters*, 330 F(2) 46 (2nd Cir. 1964), the Court said:

> "One basic test is whether the multi-employer unit was *created* with the approval, express or implied, of the employees in *each* of the constituent single-employer units." 330 F(2) at 47. (Emphasis supplied.)

In his dissent from the original Decision and Order of September 30, 1963, Board Member Boyd Leedham stated:

> "I construe Grundy's currently qualified application for membership in Sewanee as conditioned upon separate certification of a union as the majority representative of Grundy's employees. I would, therefore, direct a self determination election among Grundy's employees. If they select the same bargaining representative chosen by majority of the employees in the multi-employer unit, I would approve them in that unit. On the other hand, in the event that Grundy's employees select a different representative, or no representative, they would be excluded from the multi-employer unit and either constitute a separate appropriate unit, or be unrepresented."

We are persuaded that the events before and after the election of October 15, 1963, destroyed the consensuality needed to justify the creation and, in all events, the continuation of a multi-employer unit. The abortive effort of the Sewanee Association to come to agreement with UMW before the commencement of the strike, called by the latter, did not foreclose withdrawal, from whatever multi-employer unit may have once existed, under the unusual circumstances here present.

We are also of the view that in all events by the time the certification of the UMW as the exclusive bargaining agent of Tennessee Products and the other respondents was made on June 7, 1965, there was not in existence a legitimately identifiable multi-employer unit which could be required to bargain with the UMW. We so hold.[2]

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[2] The basis for our decision makes it unnecessary that we discuss the contentions that all charges of unfair labor practices are barred by the statute of limitations and that conflict of interest between the UMW and its members should bar an order favoring the union. We, however, consider both of these contentions to be without merit."

The alleged Section 8(a)(1), (2) violations.

On July 16, 1964, respondents Poplar Coal Company and Sycamore Coal Company[3] entered into collective bargaining agreements with the Southern Labor Union. On July 1, 1965, the United Mine Workers filed a charge that such contracts violated Sections 8(a) (1) and (2) of the Act, 29 U.S.C.A. § 158(a)(1) and (2),[4] claiming that these contracts dominated or interfered with the formation or administration of a union and constituted providing support to the SLU. These charges were consolidated and decided with the 8(a)(1) and (5) violations discussed above. Respondents Poplar and Sycamore asserted in defense the six-month statute of limitations provided in Section 10(b) of the Act, 29 U.S.C.A. § 160(b),[5]

In addition to their defense of the statute of limitations, Poplar and Sycamore assert that ultimate invalidity of the certification of UMW as the bargaining agent for them absolves them of any violation of § 8(a)(2). It has been held, however, that whether there has been a valid certification or not, an employer's entry into a contract with one union may be considered violative of the Act where there existed a serious question as to the membership of

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[3] The record is confused as to whether there were two such entities, or whether together they constituted a single enterprise owned and operated by one H. Willis Flynn. This, however, is not of controlling importance here.

[4] "§ 158. *Unfair labor practices.* (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *."

[5] "§ 160 (b) * * * *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

its employees in the union contractually recognized by the company. *NLRB v. North Electric Company*, 296 F(2) 137, 139 (6th Cir. 1961); *NLRB v. Signal Oil & Gas*, 303 F(2) 785, 788 (5th Cir. 1962); *Iowa Beef Packers, Inc. v. NLRB*, 331 F(2) 176, 182 (8th Cir. 1964); *NLRB v. National Container Corp.*, 211 F(2) 525 (2nd Cir. 1954).

If there was no evidence as to whether all of the Sycamore-Poplar employees, or a majority of them, were members of SLU, the critical question remained unanswered. The Trial Examiner made no finding in this regard. The burden is on the General Counsel to come forward with evidence to support a claim of violation. *NLRB v. Murray Ohio Mfg. Co.*, 326 F(2) 509, 513 (6th Cir. 1964); *Lawson Milk Co. v. NLRB*, 317 F(2) 756, 760 (6th Cir. 1963); *NLRB v. Cleveland Trust Co.*, 214 F(2) 95, 99 (6th Cir. 1954).

What evidence there was strongly suggested that Flynn's operation was a small one, an offshoot of Grundy, trying to operate with SLU, which union had sought a separate election of Grundy's employees. We entertain serious doubt that the proofs established that the Flynn-SLU contract violated Section 8(a)(2). However, we will not undertake to resolve it, satisfied that prosecution of the charged violation was barred by the limitation provided by Section 10(b).

The charge of violation of Section 8(a)(1) and (2) was not made until July 1, 1965, almost a year after the accused contract or contracts of July 16, 1964. If there was a violation, that is the date it occurred. The assertion of the Board that the contract, to run for three years, was a continuing violation, was considered and disposed of by the Supreme Court's opinion in *Machinists Local v. Labor Board*, 362 U.S. 411 (1960), where the Court said:

> "In any real sense, then the complaints in this case are 'based upon' the unlawful execution of the agreement,

for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the § 10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement." 362 U.S. at 423.

We therefore hold that the finding of a violation of Section 8(a)(1)(2) by Sycamore-Poplar was invalid.

Enforcement of the Board's order is, in all respects, denied.

EDWARDS, Circuit Judge, dissenting. In two consolidated cases Tennessee Products & Chemical Corporation seeks review and the National Labor Relations Board seeks enforcement of orders of the Board (167 N.L.R.B. No. 12) requiring certain Tennessee mine operators to engage in collective bargaining with the United Mine Workers.

Although this record contains both disputes of fact and bitter disputes of inferences from fact, a broad outline of undisputed facts may be stated:

In September of 1962, 41 coal companies in southeastern Tennessee formed the Sewanee Coal Operators Association for the purpose of bargaining with the United Mine Workers. Many of these companies had had a previous history of collective bargaining with the UMW.

The Sewanee Coal Operators Association and the UMW met in four collective bargaining sessions in late 1962. No agreement was reached, and in late December 1962

the UMW went out on strike. This record indicates that the strike is still continuing.

After the strike was in progress, the union petitioned for an election, and on October 15, 1963, an election was conducted for the employees of the 41 coal companies which the NLRB had found to be the appropriate bargaining unit representing all of the Sewanee Association operators. The majority of the ballots cast were challenged. The operators also challened the election because of pre-election violence. They also challenged the appropriateness of the bargaining unit because subsequent to the election, in June of 1964, the Sewanee Coal Operators Association was dissolved by resolution of its board of directors and the surrender of its Tennessee State Charter.

After hearing, these challenges were decided by the Board which ruled that the multiemployer unit had not been destroyed and continued to be appropriate, that the election had not been invalidated by violence, and that the UMW had won the election. On June 7, 1965, the Board certified the UMW as the bargaining representative for all production and maintenance employees of the Sewanee operators described as follows:

> "[Those] mining operators who were formerly members of the Sewanee Coal Operators Association, including those not now operating but who resume operating old mines either before or after the conclusion of the strike, and including also those individuals who had sole or controlling interest in a corporation which was a member of Sewanee Coal Operators Association who form another corporation and operate a new or different mine in the geographic area here involved."

The UMW then requested bargaining. On refusal, an unfair labor practice complaint was filed. Meantime, a

Sewanee operator named Flynn had formed the Poplar and Sycamore Coal Companies, and on July 16, 1964, had signed a contract with the Southern Labor Union (SLU). A hearing was conducted before a Trial Examiner who entered findings and a recommended order.

On August 22, 1967, the NLRB adopted the Trial Examiner's findings and ordered that the past members of now dissolved Sewanee and their successors cease their violations of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5) (1964), and bargain collectively with the UMW for a reasonable period of not less than 12 months. The Board also found Sycamore and Poplar were included in the employers' bargaining unit and ordered them to withhold recognition of SLU unless and until the Board certified that union. It found that the maintenance of the SLU contract was a violation of § 8(a)(2) and 8(a)(1) of the Act.

These proceedings produced the petition to review in the *Tennessee Products* case and an enforcement petition in the *Basham* case which are currently before us.

Five issues appear to require discussion:

1) Is the multiemployer bargaining unit found by the Board legally appropriate and valid?

2) Was there such a record of pre-election violence as to require setting aside the election and holding a new one?

3) Should the bargaining order be set aside because some of the companies have gone out of business?

4) Should the Board's order be set aside because of claimed conflicts of interest between the UMW and the employees it seeks to represent, or because of asserted UMW violations of the antitrust statutes?

5) Does Section 10(b) of the NLRA, 29 U.S.C. § 160(b) (1964), bar some or all of the unfair labor practice findings of the Board?

The Multiemployer Bargaining Unit

As noted, the record is undisputed that the coal operators who now protest the multiemployer bargaining unit originally founded the Sewanee Coal Operators Association voluntarily for the express purpose of bargaining with the UMW. Further, the acts relied upon to show intent to dissolve Sewanee did not take place until after failure of negotiations, the calling of the UMW strike, and the holding of the representation election.

Also of importance in relation to the appropriateness of the Board-designated bargaining unit is the fact that the 41 operators are by no means a disparate and unrelated group. On the contrary, the record shows that all of the operators had been engaged in mining in three counties in southeastern Tennessee. Two of the Sewanee companies, Tennessee Products and Tennessee Consolidated Coal Company, owned or controlled virtually all of the coal-bearing land in those three counties. Practically all of the coal mining in the three counties concerned was done under lease arrangements with either Tennessee Products or Tennessee Consolidated.

Nonetheless, the operators protest the appropriateness of the bargaining unit, claiming that the prior history of collective bargaining showed individual collective bargaining contracts, and that the record demonstrates no employer intent to be bound by group action. As far as Grundy and Consolidated are concerned, they assert that each of them joined the Sewanee Association only on the condition of an NLRB certification of a union among *their* individual employee units.[1]

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[1] Tennessee Products joined in this contention before the Board, but has not advanced it in this court.

As to these contentions, the Trial Examiner and the Board found as follows:

> "We consider first Sewanee's contention that there is no controlling history of bargaining on a multiemployer basis. To support that contention, Sewanee relies primarily on the practice of the employers to sign separate, though identical, agreements with the Union. But that circumstance is not necessarily decisive in determining whether an appropriate multiemployer unit has been established. Association-wide units may be appropriate even though separate contracts are signed,[4] or multiemployer bargaining has been conducted on the basis of an informal association.[5] The test is whether the employer parties have manifested an intent to be bound by group rather than individual action.[6] In the circumstances here, we believe that test is met. In the past the same employers who now constitute the membership of Sewanee had agreed to be bound by the identical agreement that Consolidated and Products had negotiated through Southern Tennessee Coal Producers Association. The bargaining history also reflects that the intent on the part of the companies to bargain on a multiemployer basis is a continuing one. This is clearly evidenced by the fact that in 1962 the employers who had theretofore engaged in informal joint bargaining banded themselves into a formal association whose charter reveals the intention of its members to adhere to multiemployer bargaining. And it is confirmed by the fact that Sewanee on behalf of its members actually entered into negotiations with the UMW on a multiemployer basis. In view of this background manifesting the intention of Sewanee's members to bargain jointly, we find, in agreement with the UMW, which by its petition as well as by its prior course of bargaining has manifested a simi-

lar intent, that an association-wide unit is appropriate at this time.

"We consider next the issue whether Grundy's employees should be included in the association unit or should constitute a separate unit. Grundy argues that it should not be included in the unit with the other members of Sewanee because at the time of its application for admission into that association it withheld from Sewanee final authority to bargain on its behalf.

"As appears from the minutes of a meeting of Sewanee held in October 1962, Grundy, Consolidated, and Products at that time requested permission to become members of Sewanee, but on the condition '. . . that the association would not negotiate for Tennessee Consolidated Coal Company, Grundy Mining Company, and Tennessee Products and Chemical Corporation until the United Mine Workers had been duly certified by a Board election.'

"At the hearing herein, both a UMW representative and an official of the Grundy Mining Company testified that at the first bargaining session between Sewanee and UMW a representative of Grundy stated that Grundy was not to be considered bound by the negotiations until 'a union' was certified.

"The critical question here, therefore, concerns the effect to be given to Grundy's conditional application for membership in Sewanee. At first glance, Grundy's action might suggest that it did not want to be bound by group bargaining. But the very fact that it sought admission in a multiemployer association indicates its interest in participating in collective bargaining on a multiemployer basis. Moreover, Grundy did not indicate either to other members of Sewanee or to UMW, at any time after requesting membership, or after bargaining commenced, that it no longer wished to become a member, or that it de-

sired to pursue an individual course of bargaining. We also note that included in the contract proposed to UMW by Sewanee was a mine classification styled 'A,' describing a relatively large, mechanized mine such as only Grundy operates. In these circumstances, we construe Grundy's action as manifesting an intention to join Sewanee and to be represented by it subject only to the condition of union certification on an association-wide basis. That the condition contemplated a certification based on an election in an association-wide unit also finds support in the minutes of the Sewanee meeting, adverted to above, where Products, Grundy, and Consolidated are listed *in the conjunctive* as imposing the condition. Moreover, as Consolidated has no employees of its own, a union would have to be certified on the basis of an election in an association-wide unit, including the three named companies, for Products, Grundy and Consolidated to become unconditional members of Sewanee. (Emphasis in original.)

"Thus, only a Board election conducted in an association-wide unit will determine whether Grundy will be bound by group bargaining. If a union is certified as the representative of all employees in the unit, Grundy will thereby become a member to the same extent as the other members of Sewanee. On the other hand, if no union is certified, Grundy's application for membership will lapse by reason of the failure of the condition. Therefore, since the question concerning Grundy's membership in Sewanee can only be settled by an election in an association-wide unit, we shall include Grundy in the unit found appropriate herein.

"Accordingly, we find that a unit comprising the employees of all members of Sewanee Coal Operators' Association, Inc., including Grundy Mining Company, is appropriate. We further find that the following

employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act: All production and maintenance employees of employer members of Sewanee Coal Operators Association, Inc., excluding office clerical employees, professional employees, technical employees, guards, owner-operators, mine foremen, and other supervisors as defined in the Act.

"4 *Belleville Employing Printers*, 122 NLRB 350.

"5 *Harbison-Walker Refractories Company*, 137 NLRB 1686.

"6 *The A. B. Hirschfield Press, Inc.*, 140 NLRB No. 35."

As indicated, there was a great deal of evidence—much of it undisputed—to support these findings.

Further, national labor policy as expressed by law places the responsibility for determining the appropriate bargaining unit upon the Board. 29 U.S.C. § 159(b) (1964).

While the decision of the Board on this subject is not beyond judicial review, the Supreme Court has made it clear that an appropriate bargaining unit determination should not be disturbed unless it is arbitrary. On this subject the Supreme Court said:

> "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, our power is at an end." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491-92 (1947).

The designation of multiemployer units where not arbitrary is within the discretion of the NLRB. *NLRB* v.

Checker Cab Co., 367 F.2d 692 (6th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967), *NLRB v. Teamsters Local 449*, 353 U.S. 87 (1957).

In this last case the Supreme Court said:

> "[T]he compelling conclusion is that Congress intended that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.
>
> * * *
>
> "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." (Footnotes omitted.) *NLRB v. Teamsters Local 449*, *supra* at 96.

Clearly in our instant case the coal operators voluntarily formed a multiemployer association (Sewanee) for purposes of collective bargaining with the UMW. The fact that an agreement was not reached, that a strike was called, and that the operators then sought to dissolve Sewanee did not serve to destroy the appropriateness of Sewanee as a bargaining unit. *NLRB v. Southwestern Colorado Contractors Ass'n*, 379 F.2d 360 (10th Cir. 1967); *Universal Insulation Corp. v. NLRB*, 361 F.2d 406 (6th Cir. 1966); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245 (2d Cir. 1966), *cert. denied*, 385 U. S. 1005 (1967).

In the *Universal Insulation* case, this Circuit said:

> "Universal contends that if is not bound by the new contract because of its withdrawal from the Association. However, multiemployer bargaining is '. . . a vital factor in the effectuation of the national policy of promoting labor peace through strengthened

collective bargaining.' National Labor Relations Board v. Truck Drivers Local Union No. 449, 353 U. S. 87, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957), and it follows that such bargaining cannot be effective unless an employer who has designated an employees' association as its bargaining representative is bound by the terms of the negotiated contract. N.L.R.B. v. Jeffries Banknote Company, 281 F.2d 893 (9th Cir. 1960). While it is recognized that membership in a multiemployer unit is wholly voluntary and that an employer is free to withdraw from it, the employer must clearly evince at an appropriate time its intention to do so. N.L.R.B. v. Sklar, 316 F.2d 145 (6th Cir. 1963) and the Board has ruled that withdrawal from a multiemployer unit is untimely absent union consent once negotiations on a new contract have started. The Kroger Company, 148 N.L.R.B. 569 (1964); Ice Cream Frozen Custard Employees, 145 N.L.R.B. 865 (1964); C & M Construction Company, 147 N.L.R.B. 843 (1964); Walker Electric Company, 142 N.L.R.B. 1214 (1963). This rule has recently been followed by the Second Circuit in N.L.R.B. v. Sheridan Creations, Inc., 357 F.2d 245 (March, 1966), and under the facts of this case, it is concluded that it should be followed here." *Universal Insulation Corp., supra* at 408.

These views have been recently reiterated by this court in a different factual context in *Detroit Newspaper Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967). On this record I cannot find arbitrariness in the Board designation of the multiemployer bargaining unit in this case.

Pre-election Violence

Respondents also assert that the election should be set aside because it was permeated with an aura of violence. The Board held, and I believe, on substantial evidence on

the whole record, that since there was no violence for the five months preceding election and no showing that the union was involved in any coercive conduct within that period, the violence was too remote to have a probable effect on the election. *NLRB v. Bar-Brook Mfg. Co.*, 220 F.2d 832 (5th Cir. 1955); *Southdown Sugar, Inc.*, 108 N.L.R.B. 114 (1954).

The Board itself dealt with this issue at some length in its opinion:

> "UMW excepted to the Regional Director's recommendations to sustain the portions of the objections relating to pre-election violence and to electioneering and crowding of people at the polls.
>
> "The alleged pre-election violence related to two incidents which occurred in April and May 1963, more than 5 months before the election. Each incident was the subject of separate charges, which resulted in findings of Section 8(b)(1)(A) coercion.[4] As found by the Trial Examiner in those two cases, on April 24, 1963, UMW, Local 7244 and its supporters engaged in mob threats and violence against employees of Grundy to prevent them from meeting to organize and elect officers for a Grundy Local of SLU; and on May 7, 1963, UMW, Local 7083 and its supporters engaged in mob threats and violence to prevent Grundy strike replacements from going to work at the Grundy minesite.
>
> "These two incidents occurred in the context of an economic strike called by UMW against Grundy commencing December 26, 1962; UMW's petition herein, filed February 25, 1963, for a multiemployer unit of Sewanee members' employees' including Grundy's; and UMW's charges of unlawful assistance by Grundy to an independent union, which charges, under Board practice, blocked the processing of UMW's representation petition. On May 20, 1963, a settlement agree-

ment with respect to UMW's charges of Section 8 (a)(2) assistance was approved by the Regional Director, and on May 23, 1963, SLU filed its petition herein seeking a separate unit of Grundy employees. The Board found a multiemployer unit, including Grundy, to be appropriate, in the event a majority of employees in such unit voted for UMW or SLU; and, as above indicated, the election was conducted on October 15, 1963.

"Unlike the Regional Director, we conclude that in the circumstances above outlined, UMW's strike misconduct, found violative of the Act, could have no substantial impact on voter free choice in the election. In view of the lapse of more than 5 months from the occurrence of the strike violence in question to the holding of the election, and the absence of any showing that in this interval of time any other coercive conduct was directed at employees in the unit; we find that the incidents relied on in the objections were unrelated to the election and too remote to have a probable effect upon the election.[5]

"As to those portions of the objections relating to electioneering and crowding at the polls, the Regional Director found that a large number of persons including strikers, nonstrikers, replacements and others congregated on the sidewalk and street immediately outside the polling place before and during the polling period. The election was conducted in a vacant store on courthouse square at Jasper, Tennessee,[6] on a day the Criminal Court was in session. Four Board agents conducting the election were assisted by two U. S. Marshals. The crowd was estimated to number from 200 to 2000 at various times, with a line of voters four to six deep extending from the entrance of the polling place down the sidewalk for a block or more. While the polls were opened, several unidentified persons circulated about the vot-

ing line outside the polling place wearing placards reading 'VOTE FOR UNITED MINE WORKERS AND BE ABLE TO GET A PENSION.' The Board Agent did not specify any 'no electioneering area' but did caution representatives not to enter the polling place during the election. The Regional Director based his finding concerning crowding upon pictorial evidence submitted during investigation.[7] However, he does not point to any specific incidents of disorderliness or coercive conduct but merely couples the evidence of electioneering and crowding immediately outside the polling place with the much earlier incidents of strike violence which we have found to be too remote to have an effect upon the election.

"We conclude that, under the facts here, the presence of a crowd or a massing of voters at the entrance to the polling place and the placard electioneering by unidentified persons on behalf of UMW in the area outside the polls, standing alone, did not impair the exercise of free choice in the election.

"[4] *United Mine Workers of America, Local No. 7083*, 146 NLRB No. 20; and *United Mine Workers of America, Local No. 7211*, 146 NLRB No. 29. In each case the Trial Examiner's Decision, later adopted by the Board, had issued prior to the issuance of the Regional Director's report herein.

"[5] *See, e.g., Southdown Sugar, Inc.*, 108 NLRB 114, *Krambo Food Stores, Inc.*, 101 NLRB 742, 743; *The LaClede Gas Light Co.*, 80 NLRB 839, 841.

"[6] Jasper was selected as the site of the election in part because it had not been the scene of any pre-election violence and adequate law enforcement was available. The site was suggested by attorneys for Sewanee and Grundy and approved by the Regional Director.

"[7] In its exceptions, UMW asserts that it knows of only four pictures taken of the election and attached those pictures to its brief. The pictures appeared in area newspapers, and the accompanying stories described the crowd as orderly and the election as without disorder. In addition, UMW attached affidavits from law enforcement officers, merchants, county officials and other citizens of Jasper who observed the election and found it proper and orderly."

At times in National Labor Relations Board cases suggestions are advanced that the Board in performing its duties listens with a more attentive ear to witnesses for complaining labor unions than to witnesses presented by employers, and that its decisions as a consequence are biased. It is instructive to read the opinions of the Trial Examiner and the Board in the two unfair labor practice complaints against the United Mine Workers involving alleged violent and coercive conduct by it and its members in this dispute. *UMW, Local 7083 [Grundy Mining Co.] and Southern Labor Union*, 146 N.L.R.B. 176 (1964); *UMW, Local 7241 [Grundy Mining Co.] and Southern Labor Union*, 146 N.L.R.B. 244 (1964).

On the records in each of these two cases, where the testimony of the opposing parties was in sharp conflict, the Board found the facts against respondent UMW and in each instance the Trial Examiner recommended and the Board entered a series of cease and desist orders. These orders placed the power of the federal government squarely against continuation of violent or coercive conduct. Apparently these orders had some effect, even though they had not yet become final by the date of the disputed election. In any event, the full knowledge on the part of the Board of the background of the representation dispute and the Board's participation in the suppression of violence and coercion clearly entitled it to assert knowledge and expertise concerning conditions and climate at the election site on the day on which this election was conducted.

I believe the Board's certification of this union was within "the wide degree of discretion" entrusted to the Labor Board by Congress in relation to representation matters. *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324 (1946).

Other issues posed by these cases require less discussion.

The Effect of "Going Out of Business"

Tennessee Products and other of the former operators contend that they are not in the business of mining coal, have not been in that business for years, and never intend to go back into that business. The Board order applies, however, only to those who do go back into business. The order specifies that any employer "who continues completely inoperative and outside the unit . . . may avoid the obligation imposed." Obviously, as long as some operators do not go back into operation, the Board order would be completely ineffective as to them, but it could also do no damage.

In view of the nature of the Board's order, the motion to reopen proofs to show Tennessee Products' non-operational status was properly denied.

Statute of Limitation

The operators also urge that Section 10(b) of the NLRA renders the orders of the Board invalid. Section 10(b) provides in pertinent part:

> "Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service thereof upon the person against whom such charge is made . . ." 29 U.S.C. § 160(b) (1964).

I believe, as did the Board, that this record must be read as showing a continuing demand for bargaining on the part of the UMW and a continuing refusal to bargain on the part of the operators. *See UAW* v. *NLRB*, 363 F.2d 702, 706-07 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 973 (1967).

Similarly, while the Poplar Coal Company contract with the Southern Labor Union was signed considerably more than 6 months before the unfair labor practice complaint, Poplar's (*i.e.* Flynn's) refusal to bargain was a continuing refusal and its illegal recognition of SLU was a continuing act up to the date of the unfair labor practice complaint. A collective bargaining agreement entered into, or continued, with one union while another union is the certified representative of the bargaining unit is, I believe, invalid "on its face." *Local 1424, Int'l Ass'n of Machinists v. NLRB*, 362 U. S. 411, 415 (1960). *See also NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44 (1937); *Virginia Ry. v. System Fed'n 40, Ry. Employees Dept., AFL*, 300 U. S. 515, 548 (1937). In addition, like the refusal to bargain referred to above, the continued recognition of SLU represented an unfair labor practice within the six months' limitation period "as a substantive matter." *Cf Local 1424, Int'l Ass'n of Machinists v. NLRB, supra* at 416 (1960).

Antitrust and Conflict of Interest Claims

Finally, the operators assert—with great vigor on the part of Tennessee Products—that an antitrust judgment against the UMW in the United States District Court for the Southern District of Tennessee (*Ramsey v. UMW*, 265 F. Supp. 380 (E. D. Tenn. 1967), *aff'd* 416 F. 2d 655 (6th Cir. 1969), in a case which is on appeal here now, represents final adjudication of a conflict of interest which would prohibit the Board from requiring them from bargaining with the UMW. It is clear, however, that no conflict of interest or restraint of trade facts were tendered as a defense in this NLRB proceeding. It is also clear that the conflict of interest claimed to have been found by the District Court in UMW's purchase of an interest in West Kentucky Coal terminated, as shown

by the same District Court record, before the election in this proceeding and years before the certification of the UMW:

Parenthetically, I note that no issue of the UMW's refusal to bargain was presented to the Board or to us, nor would this record justify such a finding.

The petition for review should be dismissed. The petition for enforcement of the orders of the Board should be granted.

APPENDIX B

United States of America

Before the
National Labor Relations Board

Sewanee Coal Operators Association, Et Al.,[1]

and **Case No. 10-CA-6350**

United Mine Workers of America and District #19, United Mine Workers of America

Sycamore Coal Company, Inc.

and **Case No. 10-CA-6172**

United Mine Workers of America

and

Southern Labor Union, Local No. 139
Party to the Contract

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[1] The Respondents named in the complaint in this matter are the following, referred to hereinafter as indicated in the parentheses: Sewanee Coal Operators Association (Sewanee), Basham Coal Company (Basham), Cates Coal Company (Cates), Marshall Meeks d/b/a Cherry Coal Company #15 (Cherry), James Campbell Coal Company, formerly Clear Creek Coal Company (Campbell), Coal Creek Coal Company (Coal Creek), Cardell Coal Company (Cardell), Cunningham Brothers Coal Company (Cunningham), Easy Coal Company (Easy), O. E. Ellis Coal Company (Ellis), Willis Flynn Coal Company (Flynn), Hubert Fultz Coal Company (Fultz), Goodspring Coal Company (Goodspring), Grundy Mining Company (Grundy), Howard Higgins and/or Austin Matthews d/b/a Hickory Coal Company (Hickory), Howard Higgins Coal Company (Higgins), C. P. Hunzicker Coal Company (C. P. Hunzicker), Frank Hunzicker Coal Company (F. Hunzicker), Alton Johnson Coal Company (Johnson), Kelly Creek Coal Company (Kelly), Alton Johnson d/b/a Maple Coal Company (Maple), Martin Coal Company (Martin), Marshall Meeks Coal Company (Meeks), New Floyd Coal Company (New Floyd), 9th West Coal Company (9th West), North End Coal Company (North End), Leon Nunley Coal Company (Nunley), Earl Patton d/b/a Hubert Fultz Coal Company (E. Patton), J. R. Patton Coal Company (J. R. Patton), Leon Patton Coal Company (L. Patton),

Decision and Order

On March 28, 1967, Trial Examiner Sidney J. Barban issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that certain Respondents had not engaged in the unfair labor practices alleged in the complaint.[2] Thereafter, the Respondents collectively (except Products, Cardell, and New Floyd) filed exceptions to the Decision and a supporting brief. Products individually filed exceptions to the Decision and a supporting brief. The Charging Party filed an answering brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,

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M. A. Payne, Inc. (Payne), H. Willis Flynn d/b/a Poplar Coal Company (Poplar), Joseph H. Graham d/b/a Pine Coal Company (Pine), R & S Coal Company (R & S), J. W. Sanders Coal Company (Sanders), Stephenson Brothers Coal Company, Inc. (Stephenson), Alton Johnson d/b/a Spruce Coal Company (Spruce), Sycamore Coal Company (Sycamore), Tennessee Consolidated Coal Company (Consolidated), Tennessee Products & Chemical Company (Products), Tracy City Coal Company (Tracy City), Virgil Thomas Coal Company (Thomas), Trussell Coal Company (Trussell), Walnut Coal Company (Walnut), and Whitwell Mountain Coal Company (Whitwell), all of whom are collectively referred to herein as the Respondents.

[2] The Trial Examiner found no violation of 8(a)(5) as to Sewance and New Floyd because no proof of their existence was presented at the hearing. He found no violation with respect to Easy and Whitwell because they were not properly served with the charges. We agree with these findings and hereby dismiss the allegations with respect to these Respondents.

the exceptions, the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as herein modified.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and orders that the Respondents, as named in footnote 1 of this Decision,[4] their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

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[3] We agree with the Trial Examiner that the requests to bargain were continuing requests, at least for the period of the certification year when the Board's certification required the Respondents to bargain, and that it would have been futile for the Union "to have continuously repeated such requests thereafter." In addition, however, as the Respondent had an obligation to bargain for the certification year, we view the filing of the charges on March 22, 1966, as being also a renewal of the Union's request to bargain. It constituted a clear and unmistakable notice to the Respondent that the Union intended to exercise the rights flowing from its certification and, as such, was tantamount to an explicit request to bargain. Since the Respondents failed to indicate an intention to negotiate even when properly served with these charges we view this failure as constituting another refusal to bargain. For this additional reason, we find that the six-month period of limitation contained in Section 10(b) of the Act does not bar this proceeding.

[4] We agree with the Trial Examiner that the failure to prove proper service of the charges herein upon Easy and Whitwell precludes the finding of a violation against these Respondents. However, we do not concur in his inclusion of these Respondents in his Recommended Order. Therefore, we hereby modify the Trial Examiner's Recommended Order to exclude Easy and Whitwell.

We also note that in our recent decision in *Layne and Son Coal Co.*, 10-RC-6422, issued May 8, 1967 (Not published in NLRB volumes) we found S & F Coal Co., Gob Coal Co., Birch Coal Co., and Trio, Inc., to be included within the certification in the instant case. Similarly, these companies cannot be included in this Order as they were not parties to the instant proceeding. However, we also note that the exclusion from the Order of all the aforenoted companies in no way affects their inclusion in the certified unit.

Substitute the words "on forms provided" for the words "to be furnished" in paragraph 2(c) of the Trial Examiner's Recommended Order.

Dated, Washington, D. C.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member
(Seal) National Labor Relations Board

United States of America

Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Sewanee Coal Operators Association, Et Al.,[1]
Respondents

and

Case No. 10-CA-6350

United Mine Workers of America and District #19, United Mine Workers of America
Charging Parties

Sycamore Coal Company, Inc.,
Respondent

and

Case No. 10-CA-6172

United Mine Workers of America,

and

Charging Party

Southern Labor Union, Local No. 139,
Party to the Contract

[1] The Respondents named in the complaint in this matter are the following, referred to hereinafter as indicated in the parentheses: Sewanee Coal Operators Association (Sewanee), Basham

Trial Examiner's Decision

Statement of the Case

The complaint in Case No. 10-CA-6350, issued on April 8, 1966, (based on charges filed on November 1, 1965 and March 22, 1966) alleges that the Respondents violated Sections 8(a) (1) and (5) of the Act by their refusal on or about June 17, 1965, and at all times thereafter, to bargain collectively with United Mine Workers of America, herein referred to as UMW, as the exclusive representative of the employees in a unit found appropriate by the Board.

Coal Company (Basham), Cates Coal Company (Cates), Marshall Meeks d/b/a Cherry Coal Company #15 (Cherry), James Campbell Coal Company, formerly Clear Creek Coal Company (Campbell), Coal Creek Coal Company (Coal Creek), Cardell Coal Company (Cardell), Cunningham Brothers Coal Company (Cunningham), Easy Coal Company (Easy), O. L. Ellis Coal Company (Ellis), Willis Flynn Coal Company (Flynn), Hubert Fultz Coal Company (Fultz), Goodspring Coal Company (Goodspring), Grundy Mining Company (Grundy), Howard Higgins and/or Austin Matthews d/b/a Hickory Coal Company (Hickory), Howard Higgins Coal Company (Higgins), C. P. Hunzicker Coal Company (C. P. Hunzicker), Frank Hunzicker Coal Company (F. Hunzicker), Alton Johnson Coal Company (Johnson), Kelly Creek Coal Company (Kelly), Alton Johnson d/b/a Maple Coal Company (Maple), Martin Coal Company (Martin), Marshall Meeks Coal Company (Meeks), New Floyd Coal Company (New Floyd), 9th West Coal Company (9th West) North End Coal Company (North End), Leon Nunley Coal Company (Nunley), Earl Patton d/b/a Hubert Fultz Coal Company (E. Patton), J. R. Patton Coal Company (J. R. Patton), Leon Patton Coal Company (L. Patton), M. A. Payne, Inc. (Payne), H. Willis Flynn d/b/a Poplar Coal Company (Poplar), Joseph H. Graham d/b/a Pine Coal Company (Pine), R & S Coal Company (R & S), J. W. Sanders Coal Company (Sanders), Stephenson Brothers Coal Company, Inc. (Stephenson), Alton Johnson d/b/a Spruce Coal Company (Spruce), Sycamore Coal Company (Sycamore), Tennessee Consolidated Coal Company (Consolidated), Tennessee Products & Chemical Company (Produets), Tracy City Coal Company (Tracy City), Virgil Thomas Coal Company (Thomas), Trussell Coal Company (Trussell), Walnut Coal Company (Walnut), and Whitwell Mountain Coal Company (Whitwell), all of whom are collectively referred to herein as the Respondents.

The complaint in Case No. 10-CA-6172, issued on September 3, 1965, (based on charges filed July 1, 1965 and August 30, 1965), alleges that Respondent Sycamore, in its trade name and style of Poplar Coal Company, Inc., recognized and signed a collective-bargaining agreement with Southern Labor Union, Local No. 139, herein referred to as Southern Labor Union, and thereafter maintained and enforced that agreement in violation of Section 8(a) (1) and (2) of the Act.

Answers to the complaints were filed by all Respondents except Cardell and New Floyd. Respondent Sewance was alleged by its former counsel and officer to be no longer in existence. All answers denied the violations of the Act alleged in the complaints, although admitting certain factual allegations. No answer appears from Southern Labor Union.

These proceedings were heard before Trial Examiner Sidney J. Barban at Chattanooga, Tennessee, on September 19 and 20, 1966, upon an Order Consolidating Cases and Notice of Hearing. All Respondents, except Cardell and New Floyd, were represented at the hearing. The former counsel and officer of Sewance appeared specially asserting that Sewance was no longer in existence. Southern Labor Union was not represented at the hearing.

Upon the entire record in this case,[2] from my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, Products, and all other Respondents except Cardell and New Floyd, the Trial Examiner makes the following:

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[2] In accordance with the rulings made at the hearing, the Trial Examiner has studied and considered the transcripts and exhibits in Cases Nos. 10-RC-5497, 5593, 5604, 5605, insofar as they bear on the issues in this matter. A stipulation of the parties with respect to certain charges filed and withdrawn by UMW, submitted after the close of the hearing, has been marked Sewance Exh. 2 and is received in evidence.

Findings of Fact and Conclusions

I. Jurisdiction

The Board, in its Decision and Direction of Election in Cases Nos. 10-RC-5497, 5593, 5604, 5605 (unreported), dated September 20, 1963, (herein called the representation proceeding) asserted jurisdiction over Sewanee and members of Sewanee, located in Tennessee, finding that the employees of all members of Sewanee comprised a multiemployer unit appropriate for the purposes of collective bargaining. Subsequently, in a Decision and Direction, dated May 17, 1965, 152 NLRB 663, the Board, as more fully discussed hereinafter, found that the multiemployer unit continued appropriate for the purposes of collective bargaining after the dissolution of Sewanee, and thereafter the UMW was certified by the Board as the exclusive representative of the employees in that unit. The present proceeding concerns the obligation of those operators, as defined in the Board's Decision and Direction of May 17, 1965, to bargain with the UMW pursuant to that certification.

The pleadings in this matter show that Grundy and Sycamore, employers within the unit found appropriate by the Board, each sold and delivered to Consolidated, during the past calendar year, coal of a value in excess of $50,000 which those employers had mined in Tennessee. During the same period, Consolidated sold and shipped coal to customers located outside the State of Tennessee of a value in excess of $50,000.

Products, a former member of Sewanee within the definition of the unit found appropriate by the Board, admits that it is engaged in commerce within the meaning of the Act, but denies that it has engaged in mining coal in the area involved since 1962, or that it has recently sold or shipped any coal to customers outside the State of Tennessee.

The operations of other Respondents (except New Floyd) included within the appropriate unit, as more fully discussed hereinafter, have been affected by a strike which began on or about December 26, 1962, and was unresolved at the time of the hearing in this matter.

Upon the above, it is found that the Respondents in this proceeding, except New Floyd, are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction over the Respondents, other than, for reasons set forth hereinafter, New Floyd. See *Electrical Contractors of Troy and Vicinity*, 116 NLRB 364, Cf. *Hygenic Sanitation Co.*, 118 NLRB 1030.

II. Labor Organizations

UMW, District #19, United Mine Workers of America and Southern Labor Union are labor organizations within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. *The Issues*

The issues in these proceedings derive for the most part from contentions of the parties as to the effect of the dissolution of Sewanee and the cessation of operations of a substantial number of its members upon the multiemployer unit found by the Board upon the obligation to bargain with UMW which was certified by the Board in that unit, and the propriety of an order against Respondents, or any of them, in the circumstances. The principal issues in Case No. 10-CA-6350 are the following:

1. Whether the complaint is barred by Section 10(b) of the Act because not all Respondents were served with copies of the charges within 6 months of the UMW request for bargaining, although copies of the charge were

served upon all Respondents thereafter within 12 months after certification of UMW by the Board.

2. Whether the dissolution of Sewanee and the cessation of operations of a number of its members destroyed the multiemployer unit found appropriate by the Board or renders impermissible an order directing Respondents, or any of them, to bargain with the UMW in such unit.

3. Whether, in particular, the complaint against Products should be dismissed on the asserted ground that it had no employees at the time of the election and has none now, and has not been engaged in the basic operation involved—mining coal—for many years.

4. Whether UMW is engaged in operations in competition with Respondents making it improper to require Respondents to bargain with UMW.

In Case No. 10-CA-6172, the issue presented is whether the complaint is barred by Section 10(b) of the Act, inasmuch as the charges in that case were filed and served more than 6 months after the execution of the collective-bargaining agreement attacked in that case.

B. *Background; Prior Proceedings*

The Respondents (other than New Floyd) are or have been involved with the coal mining industry in three counties of the State of Tennessee (Marion, Sequatchie and Grundy). Two of the Respondents, Products and Consolidated, during times material to this proceeding, have controlled almost all the coal bearing land in those counties, and with few exception, those Respondents who are, or have been, mining coal in that area have done so pursuant to arrangements made by themselves or by others with Consolidated or Products.

In September, 1962, a number of operators mining coal in the three county area formed and incorporated

Sewanee to represent them in collective bargaining with the UMW. Sewanee and the UMW met on four occasions between September 1962 and January 1963, but were not able to reach an agreement. In fact, the employees of members of Sewanee represented by the UMW went on strike on or about December 26, 1962, as a result of which the mines operated by Sewanee members were shut down. According to the testimony of a representative of the UMW in the present proceeding, the strike continued to be current at the time of the hearing in this case.

In February, 1963 the UMW filed a petition for certification as the bargaining representative of the employees employed in a multiemployer bargaining unit including the members of Sewanee, docketed as Case No. 10-RC-5497. This petition was consolidated with the petitions of the Southern Labor Union for separate single employer units of three members of Sewanee—Grundy, Stephenson and Payne—docketed as Cases Nos. 10-RC-5593, 5604, and 5605. Following a hearing on the consolidated cases, the Board, on September 20, 1963, issued its Decision and Direction of Election, finding a multiemployer bargaining unit of the employees of members of Sewanee appropriate, and directing an election in that unit.

The challenged ballots cast at the election being sufficient to affect the results of the election, the Board directed that a hearing on the issues raised be held before a trial examiner of the Board. Thereafter, upon motion of Grundy that the original representation hearing be reopened to receive evidence of events occurring since that time allegedly affecting the unit in substantial respects, the Board broadened its Order directing a hearing to include the matters raised by Grundy's motion.

A hearing was held pursuant to the Board's Order before Trial Examiner Boyls on June 16 and 17, 1964. At

the hearing, the parties entered into stipulations, upon which the Board ordered the challenged ballots opened and counted. Based upon the record and Trial Examiner Boyls's Report on Challenged Ballots and Events Affecting Composition of Unit, the Board also affirmed its prior finding that a multiemployer unit was appropriate with clarifications which must now be considered.

In her report as adopted by the Board, Trial Examiner Boyls found that after all of the members of Sewanee had been shut down by the strike of December 1962, a number of changes had taken place. Among these was the decision of Sewanee to dissolve and the surrender of its charter to the State of Tennessee in June, 1963. Of the various members of Sewanee, it was noted that Grundy had resumed operations in May, 1963, and was in the process of assisting another, H. Willis Flynn, to resume operations. Trial Examiner Boyls further found that "a number [of the small mine operators who were members of Sewanee] in addition to Grundy are now engaged in operating coal mines and that others have expressed an intention or desire to resume operating their old mines or start operating new ones when and if they can." With respect to some of the previous members of Sewanee who testified that they had no intention of resuming the business of operating coal mines, Trial Examiner Boyls, on the basis of the record and the analysis of the evidence set forth, stated her conviction that some of those so testifying would "find the means of again operating their old mines or other mines in that area," and would continue to have the need of multiemployer strength in dealing with a representative of their employees in collective bargaining.

Trial Examiner Boyls held that the multiemployer unit previously found appropriate by the Board was not destroyed or rendered inappropriate by "the fact that Sewanee surrendered its corporate charter and dissolved

itself as a corporation, since such unit may exist without any formal organization." She found it significant that the operators had a history of successful bargaining on a multiemployer basis, had evidenced a desire to continue bargaining on that basis, and had engaged in substantial collective bargaining on that basis with the UMW. As the trial examiner noted, while employers may withdrawn from multiemployer units at appropriate times, "plainly a withdrawal after bargaining negotiations have commenced, a strike has ensued, and the Union has won an election in the multiemployer unit is not an appropriate time."

As to the composition of the unit, the trial examiner stated, in part:

> The record shows that several of the small operators who have been found by the Board to constitute a part of the multiemployer bargaining unit operated under corporate names but are now operating as individuals or under different corporate names. Where an individual had the sole or controlling interest in a corporation which was a member of Sewanee, it seems only fair and realistic, for the purposes of this proceeding to consider him rather than the corporation as the person constituting a part of the multiemployer group. Accordingly, where the individual forms another corporation and operates a new or different mine in the geographic area here involved, his employees should be treated as continuing to constitute a part of the multiemployer bargaining unit. By the same token it should be considered material for the purpose of this proceeding that a member of Sewanee is now operating, or will when the strike ends be operating, a mine in the same geographic area, different from the one he operated prior to the strike.
>
> * * *

> It may well be that a substantial number of those operators who were members of Sewanee before the strike started will never again operate coal mines in the area here involved. But even a substantial diminution in the membership of a multiemployer unit does not destroy that unit or render it inappropriate.
>
> . . . It is accordingly recommended, that the Board certify the UMW as the collective bargaining representative of all the production and maintenance employees of those coal mining operators who were formerly members of Sewanee, including those who are not now operating but who resume operating at the end of the strike or before the conclusion of the strike.

In its Decision and Direction, dated May 17, 1965, the Board, in approval of Trial Examiner Boyls' findings and conclusions clarified the unit description as including "all production and maintenance employees of coal mining operators who were formerly members of Sewanee Coal Operators Association, including those not operating but who resume operating old mines either before or after the conclusion of the strike, and including also those individuals who had sole or controlling interest in a corporation which was a member of Sewanee Coal Operators Association who form another corporation and operate a new or different mine in the geographic area here involved."[3]

On June 7, 1965, the Regional Director certified the UMW as the exclusive bargaining representative of the employees involved. On August 31, 1965, the Regional Di-

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[3] The Board, in its original Decision and Direction of Election, had excluded from the unit, "office clerical employees, professional employees, technical employees, owner-operators, mine foremen, and their supervisors as defined in the Act."

rector served a corrected Certification of Representative in the representation proceeding describing the unit in the terms used by the Board in its Decision and Direction.

C. *Respondents' Relationship to Sewanee*

On the basis of the record as a whole, it is found that the following Respondents are either former members of Sewanee or were formed or controlled by former members of Sewanee within the meaning of the Decision and Direction of the Board, dated May 17, 1965, in the representation proceeding (the first 29 listed being stipulated by the parties in this proceeding): Basham, Cates, Campbell,[4] Cunningham, Easy, Ellis, Flynn, Fultz,[5] Goodspring, Higgins, C. P. Hunzicker,[6] F. Hunzicker, Johnson, Kelly, Martin, Meeks 9th West, North End, Nunley, E. Patton, J. R. Patton,[7] Payne, R & S, Sanders, Stephenson, Tracy

[4] It appears that this employer is the same as Coal Creek Company located at Tracy City, Tennessee. (See pp. 21 and 340 of the June, 1963, transcript and Sewanee Exhibit No. 10 before Trial Examiner Boyls.) It is probable that Respondent Coal Creek, which the formal papers in this proceeding locates at Whitwell, Tennessee, is the same employer. For the purpose of this decision, it is assumed that Campbell and Coal Creek refer to the same operator, hereinafter called Campbell.

[5] Sometimes, spelled Fults, and possibly correctly since it so appears on postal return receipts. The record shows that Fultz became a member of Sewanee when operating a mine leased from Earl Patton. When Fultz turned the mine back to Earl Patton, the latter succeeded to Fultz' membership.

[6] Sometimes referred to in the record as J. P. Hunzicker.

[7] The stipulation read into the record by the General Counsel names "James Patton Coal Company" as a member of Sewanee. However, there is no Respondent by that name in this proceeding. J. R. Patton, which is a Respondent in this matter, was one of the companies named in the petition in the representation proceeding and was listed by counsel for Sewanee as one of its members in the 1963 transcript. In the proceeding before Trial Examiner Boyls, James Patton was identified as the operator of Leon Patton Coal Company, a Respondent herein, which was owned by Leon Patton, and was a member of Sewanee. It is found that both Respondents J. R. Patton and L. Patton were members of Sewanee.

City, Thomas, Trussell, Whitwell, L. Patton, Grundy, Products, Cardell,[8] Hickory,[9] Maple,[10] Poplar,[11] Cherry,[12] Spruce, Sycamore, Walnut, and Pine.[13] While Consoli-

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[8] Grundy and Products were specifically found to be members of Sewanee in the representation proceedings. Cardell (sometimes spelled Cordell in the record) was clearly among the 33 companies found by the Board in the representation proceeding to be members of Sewanee. It was named on the list of companies attached to the petition in the representation proceeding, which all parties appear to have accepted as members of Sewanee in that proceeding (with the exception of Grundy). Counsel for Sewanee specifically named Cordell in that proceeding as one of the employers concerning which he would stipulate facts establishing the Board's jurisdiction.

[9] Howard Higgins, the sole owner of Respondent Higgins (now inoperative), started and was the sole owner of Respondent Hickory, which mine has since been taken over and is being operated under a different company name by Austin Matthews. Matthews was previously one of the partners in Respondent R & S (now inoperative). Higgins is now a stockholder and apparently operates Respondent Walnut in which Consolidated is the prineipal stockholder.

[10] Alton Johnson, who is the sole owner or has controlling interest in Respondent Johnson (now inoperative) is the sole owner of Respondent Maple, on lease from Consolidated, and is in the process of merging Maple and Mary Lee Coal Company, which is owned by Alton Johnson and Consolidated. Alton Johnson also formed and is the sole owner of Respondent Spruce, which is currently operating.

[11] H. Willis Flynn, who is the sole owner or has controlling interest in Respondent Flynn (now inoperative), formed Respondent Sycamore and took over Respondent Poplar, and is the sole owner of both.

[12] Marshall Meeks, who is the sole owner or has controlling interest in Respondent Meeks (now inoperative), started and is the sole owner of Respondent Cherry, which is also now inoperative.

[13] J. H. Graham, a member of the Board of Directors of Sewanee, who had a 50 percent interest in and apparently operated Respondent 9th West (now inoperative), testified that he started Respondent Pine and operated it until he found it to be unprofitable, at which time he turned the mine back to Consolidated. According to Huston Beaumont, a vice-president of Consolidated and Grundy, the Pine Coal Company mine was recently closed

dated was not named in the list attached to the petition in the representation proceeding, it owns and controls Grundy, and the record shows that Consolidated's application for membership, like that of Grundy and Products was contingent only upon certification of UMW by the Board, which contingency, as the Board noted in its original Decision and Direction of Election, has been fulfilled. The Trial Examiner has been unable to find any probative evidence of the existence of New Floyd, named as a Respondent herein.

D. *The Requests and Refusal to Bargain*

On June 17, 1965, the UMW sent the following letter, addressed to "William A. Ables, Counsel and Secretary" of Sewanee, and sent copies to all of the Respondents, except as noted below:[14]

> United Mine Workers of America has been certified as the bargaining agent, by the National Labor Relations Board, for the employees who are employed by the operators of your Association.
>
> We reiterate what we previously stated in other meetings with you that all matters are negotiable, and we believe a sincere effort should be made, by all con-

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after being owned and operated by Harfs McHone, who, according to his testimony before Trial Examiner Boyls, was associated with Austin Matthews and others in the operation of Respondent R & S. Both Graham and McHone are shown by the record to have interests in coal mines currently operating in the area here involved.

[14] No letter appears to have been sent to Cherry, Johnson or Pine. However, since a copy was sent to Maple and to Alton Johnson personally for Spruce, it is found that a sufficient request was upon Johnson. Similarly the request to Meeks would involve Cherry and the request to 9th West would cover Pine. See footnotes 10, 12 and 13, *supra*. Copies of the letter were also sent to others not named in this case.

cerned, to settle all differences through collective bargaining.

United Mine Workers of America desires to meet at a mutually agreed time and place to negotiate a contract.

Trusting to hear from you . . . .

On July 19, 1965, the UMW sent the following letter addressed to each of the Respondents, except as noted below:[15]

On June 17, 1965, we wrote to you and offered to negotiate a contract covering wages, hours of work, and other conditions for your employees who have designated United Mine Workers of America as their bargaining agent. To date you have wilfully refused to answer our letter.

We again advise that the National Labor Relations Board has certified the United Mine Workers of America as the bargaining agent of your employees.

Failure on your part to sit down and negotiate in good faith in the near future will be considered by us as a refusal to comply with the Law of the Land, and proper application for the enforcement thereof will be pursued.

We request an early reply.

None of the Respondents consented, in answer to these letters, to recognize and bargain with the UMW as the bargaining agent certified by the Board. It was stipulated

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[15] No letter was sent to Cherry, Johnson, Pine, Whitwell, or Grundy. Letters were sent to Johnson for Spruce and to Maple, as in the case of the previous letter, as was the case with Meeks and 9th West also. Also, since the letter was sent to Ables, who the record shows represents Consolidated and Grundy, in the circumstances presented herein, it is found that this was effective notice to Grundy. See *N.L.R.B. v. Albuquerque Phoenix Express*, . . . F. 2d, 63 LRRM 2407, 2408 (C.A. 10, 1966). Copies of this letter were also sent to others not named as Respondents here.

(except as to Cardell and New Floyd) that the July 19 letter, was received by the addressees, and that those Respondents made no response to this letter.[16]

E. *Respondents' defenses in Case No. 10-CA-6350*

1. *Service of the charges.* Respondents contend that the complaint in this matter must be dismissed under the provisions of Section 10(b) of the Act for failure to properly serve the charges on Respondents within 6 months of the date of the letters of the UMW requesting bargaining.

The original charges in this case were filed by UMW on November 1, 1965, and were served upon the following Respondents on November 2, 1965: Cherry, Campbell, Flynn, Grundy, Hickory, Maple, Meeks, 9th West, E. Patton, L. Patton,[17] Pine, Stephenson,[18] Spruce, Sycamore, and Walnut. The charge did not name and apparently was not served upon Sewanee, as such.

An amended charge in Case No. 10-CA-6350 was filed by the UMW on March 22, 1966, and was served on March 28, 1966, upon "William M. Ables, Jr., attorney," personally, and upon Sewanee, in care of Ables, and upon the Respondents named above and the following additional Re-

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[16] After the letter of June 17, Products wrote Ables on June 29, 1965, with a copy to the UMW, stating, "This is to advise you that you, as an individual or as the representative of any association of any kind, have no authority to represent us directly or indirectly in any bargaining negotiations or any litigation of any kind or nature."

[17] The original charge named and was served upon "James Patton Coal Co." James Patton's testimony in the representation proceeding establishes that this operation is the same as Respondent L. Patton. In its amended charge, noted hereinafter, the UMW correctly named Respondent L. Patton.

[18] The original charge named and was served upon "John Stephenson Coal Co." The record in the representation proceeding shows that the parties identified this operation with Stephenson Brothers Coal Company, the Respondent herein.

spondents: Basham, Cates, Cardell, Cunningham, Ellis, Fultz, Goodspring, Higgins, C. P. Hunzicker, F. Hunzicker, Johnson, Kelly, Martin, North End, Nunley, J. R. Patton, Payne, Poplar, R & S, Sanders, Products, Tracy City, Thomas, and Trussell.[19]

The General Counsel's contention is two-fold. First, he asserts in effect, that there is a multiemployer entity composed of former members of Sewanee and their successors, which was adequately put on notice of the original charges by "service upon as many constituent members [of the entity] as could at that time be readily and reasonably identified . . . further supported by the filing and service of the amended charges giving specific notice to additional members as their involvement became more apparent." The General Counsel further asserts that, in any event, the requests to bargain were of a continuing nature, particularly since no answers were given, and therefore all charges were timely filed.

The UMW, in addition, asserts that since it was not formally advised that Sewanee no longer represented the Respondents, UMW was justified in continuing to deal with Ables as having apparent authority, and Respondents are estopped from questioning service on Ables.

Both the Act, in Section 10(b), and the Board's Rules and Regulations, in Section 102.14, require that a charge of unfair labor practices be served "upon the person against

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[19] The findings as to the service of the charges are based upon affidavits of service and registered return receipts placed in evidence by the General Counsel without objection from the parties. Although the Respondents denied actual service in their answers, no issue has been made of the point in the briefs. The General Counsel's exhibits also shows that copies of the charges were sent by registered mail to Easy, New Floyd, and Whitwell, but were returned to the Regional Office of the Board, for reasons which do not appear. With respect to Easy, the charges were directed to Max Condra, the owner of Easy, at the address he gave in testimony, before Trial Examiner Boyls. Testimony in this proceeding shows that Condra is still active in mining operations in the area.

whom [the] charge is made." The decided cases tend to the conclusion that the requirement is for personal service upon the person charged or his agent. While service upon members of a joint venture may bind the venture as a whole, particularly where all are served, see *Stuart v. Medahl Dam Constructors*, 236 F. Supp. 126 (W.D. Penna. 1964), the Board has regularly refused to hold that participation in a multiemployer bargaining unit or in a multiemployer contract constitutes one participant the agent of another for the purpose of accepting service. See *Moving Storage Negotiating Committee, etc.*, 135 NLRB 387; *Galveston Maritime Association, Inc.*, 122 NLRB 692, 697; *George D. Auchter Company*, 102 NLRB 881, 885. Indeed, where the agency through which such multiemployer bargaining is carried on is completely informal, or has dissolved, service on the participants personally is required if they are to be bound. See *Electrical Contractors of Troy and Vicinity*, 116 NLRB 354, 361; Cf. *Southwestern Colorado Contractors Assn. etc.*, 153 NLRB 1141. Since service of process must be personal, constructive service, such as that proposed by the General Counsel, cannot be held sufficient. Cf. *Cleff and Spear d/b/a Demi*, 104 NLRB 1048. Nor does the UMW's contention that Respondents are estopped from contending that service on Ables was not good service on all rest on any better footing. However much merit that theory might have in the absence of notice to UMW of the dissolution of Sewance, here UMW clearly had actual notice of that fact. Nor has UMW demonstrated that it was prejudiced by the necessity of serving a copy of the charges upon all of the employers, who, in the last analysis, would be personally responsible for effectuating the duty to bargain raised by the Board's certification. See *Electrical Contractors of Troy, supra; Southwestern Colorado Contractors Assn., supra.*

However, the argument that Respondents' refusal to bargain constituted a continuing violation, in the circum-

stances of this case, stands on a firmer basis. It must be borne in mind that the UMW was certified as the bargaining representative of the employees involved on June 7, 1965. Absent special circumstances, the Respondents' obligation to honor this certification was absolute for the first year thereafter. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96. Both requests of UMW to Respondents to bargain in accordance with the obligation imposed by the certification were made within the certification year. None of the Respondents agreed to bargain as requested and, indeed, none answered the UMW's last request of July 19, 1965. Under the circumstances, there can be no question, in fact or law, that the requests to bargain were continuing requests, certainly for the period of the certification year, and it would have been futile for UMW to have continually repeated such requests thereafter.

In a somewhat similar situation, the U.S. Court of Appeals for the District of Columbia stated, in *UAW v. N.L.R.B. (Aero Corp.)*, 363 F. 2d 702, at 706 (1966);

> The Board was justified in construing the Union's demands and the company's refusal as a continuing demand for recognition and bargaining and a continuing refusal, when "another formal demand in light of the company's prior peremptory refusal would have been useless." *Local 152 v. N.L.R.B.*, 120 U.S. App. D.C. 25, 28, 343 F. 2d 307, 310 (1965).

This conclusion is all the more applicable to this case where, during the period involved, Respondents were the subject of a current strike over issues of collective bargaining which itself constituted a continuing demand for bargaining, see *Scobell Chemical Company, Inc. v. N.L.R.B.*, 267 F. 2d 922 (C.A. 2, 1959), and where Respondents' failure to answer the request for bargaining, constituted in effect, a continuing refusal of the Union's request. Cf. *N.L.R.B. v. White Construction and Engineer-*

ing Co., Inc., 204 F. 2d 950. Since both charges were filed in this proceeding within the certification year, on the basis of the entire record in this matter, it is found that the charges were timely filed within the meaning of Section 10(b) as to all Respondents previously found to have been properly served.[20]

2. *The duty to bargain.* On the basis of the record in this proceeding it is clear that at all times material the UMW was and continues to be the exclusive bargaining representative of the employees in the appropriate bargaining unit heretofore found by the Board. Respondents have represented assert, however, that there was no obligation upon them to bargain with the UMW in response to the requests made because of the circumstances then obtaining. Thus, the brief for the Respondents other than Products argues that, after the dissolution of Sewanee, "there was no duty by the former membership [of Sewanee] to sit down and bargain with UMWA as a majority of these companies were out of business and a great majority of these companies have no employees, and those still operating had employees whom the employers in good faith determined were not represented by UMWA." Respondent Products argues, *inter alia*, that it had no duty to bargain with the UMW because it assertedly was not engaged in coal mine operations and had no employees at the time of the requests to bargain by UMW, and had not had any such employees since February 1968.

It should be noted at the outset that the basic contentions now made in respect to the effect upon the unit of

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[20] Respondents strongly rely on *Local Lodge No. 1424, I.A.M. (Bryan Mfg. Co.) v. N.L.R.B.*, 362 U.S. 411 (1960), and a number of other cases including *American Association of Grain Millers v. N.L.R.B.*, 197 F. 2d 451 (C.A. 5, 1952). These cases are distinguishable from the present situation as the decisions of the Courts in *Aero Corp.* and *Scobell, supra*, show.

non-operation of the mines were fully litigated before and considered by Trial Examiner Boyls and the Board in the previous proceeding in which the appropriate unit was established. Leaving aside Respondent Products' separate contention, which is considered hereinafter, the evidence in the present proceeding is not inconsistent in any material aspect with the facts before the Board at the time of its prior decision with respect to the unit, and, indeed, to a substantial extent, supports the prior findings made.

From the record, it appears that prior to the strike in December, 1962, there was considerable continuity and stability in the coal fields with which we are here concerned. This area was largely controlled by Consolidated and Products, who leased them from their owners, and in turn either mined the land themselves, or leased certain sections to others who mined the coal under various financial arrangements with Products and Consolidated.

These operations were shut down by the strike of December, 1962. However, neither Products nor Consolidated abandoned their efforts to have these areas mined. In May, 1963, Consolidated resumed mining coal through Grundy, its wholly owned subsidiary, which has operated continuously since that time, and has subleased to others, some of whom, at least, are identical with, or have substantial connections with, persons who were original members of Sewanee. Consolidated itself has direct substantial, or controlling, interest in some of these operations in addition to the control it exercises through Grundy. Coal is also being mined on land controlled by Products by persons to whom Products has leased part of the coal fields which it controls. Among these are individuals who also were connected with Sewanee.

As noted by Trial Examiner Boyls, most of the dislocations which occurred among the mine operators who

formed Sewanee—and relied upon by Respondents here to justify their refusal to bargain—"have resulted either directly or indirectly from the long and bitter strike which commenced on December 26, 1962, and is still in progress." (152 NLRB at p. 669). However, neither the existence of the strike, nor the fact that it was successful in shutting down a large part of the operations covered by the unit would justify the refusal to bargain. See *N.L.R.B. v. Deena Artware, Inc.*, 198 F. 2d 645, 651 (C.A. 6, 1952); *N.L.R.B. v. Pecheur Lozenge Co., Inc.*, 209 F. 2d 393, 403 (C.A. 2, 1953); *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 245 F. 2d 594, 595-596 (C.A. 5, 1957). Indeed, the very fact that the strike has succeeded in imposing such a burden upon interstate commerce makes all the more imperative the implementation of the policy of the law that those involved attempt through collective bargaining to resolve their dispute. Thus the Court of Appeals for the Second Circuit stated in *N.L.R.B. v. Pecheur Lozenge, Inc., supra*, at p. 403:

> The existence of a strike does not suspend the obligation on the part of the employer to bargain. In *N.L.R.B. v. Remington Rand, Inc.*, 2d Cir., 130 F. 2d 919, 927, this Court stated: "Nor does the fact of a strike of itself relieve the employer of his duty under the Act to bargain collectively with his employees . . . On the contrary, the need for carrying out that obligation when a strike is in progress is all the greater in order that a peaceful settlement of the dispute may be reached." As the Court stated in *Jeffery-DeWitt Insulator Co. v. N.L.R.B.*, 4 Cir., 91 F. 2d 134, 140: . . . "If an employer in the presence of a strike could rid himself of the obligation to negotiate by declaring further negotiations useless . . . the statute enjoining collective bargaining would largely fail of its purpose. We do not think that it can be brushed aside so easily."

Nor, for reasons set forth in the decision of the Board and Trial Examiner Boyls, is this obligation affected by the fact that some of the original members of Sewanee may not resume operations at the end of the strike. Indeed, notwithstanding the testimony of some of the operators involved before Trial Examiner Boyls, that they had no present intention of resuming operations, the present Trial Examiner is convinced, as was Trial Examiner Boyls, that a substantial number of them are quite likely to resume operations in the area concerned if favorable conditions can be obtained. One prominent example bearing out Trial Examiner Boyls' conclusion is that of Joseph Graham, a former director of Sewanee and operator of one of the Sewanee members. During the hearing before Trial Examiner Boyls he testified, much in the same vein as other operators, that his mines were disabled, his equipment stolen or damaged, his lease cancelled by Products, and that he had "no intention of operating any mines," and did not then "have any prospects of any lease arrangements with anybody." From the record in the present proceeding, however, it is clear that Graham is again extensively involved in coal mining activities on Products' property. His testimony also indicates that Max Condra, the former president of Sewanee, and Alton Johnson, a former member, are involved in coal mining operations in the area. See also footnotes 8-11 above.

From the above, it is patent that a substantial part of the unit found appropriate by the Board is presently operating. As pointed out by Trial Examiner Boyls and affirmed by the Board, the mere diminution of a multiemployer unit does not serve to render the unit inappropriate. It is therefore plain that if Respondents then in existence had not dissolved Sewanee, the obligation to bargain upon request would be clear. The question then is whether those Respondents may avoid that obligation by their unilateral act in dissolving Sewanee after the commencement of collective bargaining. It is plain that they may not:

The rule and the reason for it have been quite recently explicated by the Court of Appeals for the Second Circuit in *N.L.R.B. v. Sheridan Creations, Inc.*, 357 F. 2d 245 (1966), where the Court stated at pp. 247-248:

> The Board's rule . . . that withdrawal from a multi-employer unit is untimely, absent union consent, once negotiations on a new contract have started, seems to us logical . . . to permit withdrawal after negotiations commence might well lead to a breakdown of the unit. Withdrawal would be restricted to the period before negotiations to assure that this is not used as a bargaining lever.
>
> Multi-employer bargaining is based on the consent of the parties to treat with one another through the agreed units. A shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process . . . the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun.

Thus, although the dissolution of Sewanee may have destroyed it as an entity which may serve thereafter as an agent of its members, or against which a remedial order in this proceeding may be entered, this action by the members of Sewanee may not also serve to insulate those members from the obligation imposed by the Act that they bargain with the duly designated representative of their employees for the purposes of collective bargaining. See *Southwestern Colorado Contractors Association, supra; Electrical Contractors of Troy, supra.* Cf. *Employers' Assn. of Bldg., Metal Fabricators, etc.*, 149 NLRB 382.

It is suggested, however, that because in this case the Board's unit finding includes persons who may not be in operation until some later time, the finding is not sufficiently definite or fixed to raise an obligation to bargain.

This argument ignores the fact that at the time the requests to bargain were made the composition of the unit was sufficiently definite to permit meaningful bargaining, if the members of Sewanee had seen fit to choose that course of action at that time. The fact that those Respondents did not brought to fruition in these coal fields "the lively possibilities for disrupting the bargaining process" foreseen by the Court in *N.L.R.B. v. Sheridan*, *supra*, and undoubtedly contributed to the confusion and lack of stability complained of by Respondents here.[21]

There is also no factual basis in the record for the contention made by Respondents (other than Products) that Respondents now operating determined in good faith that their employees were not represented by UMW. Indeed, to the extent that adherence to the UMW has been diluted, this must necessarily be attributed to the Respondent's refusal and failure to honor the certification of the Board and bargain with the UMW as the representative of the employees involved.

Special consideration must be given to Products' contentions that it was not a member of Sewanee and had given only limited authorization to the association, as well as the contention that Products ceased coal mining operations in January 1962, and terminated all employees en-

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[21] The record indicates that the Sewanee members believed that the UMW would not settle for less than a standard agreement, under which they felt they could not economically survive. Cf. *Pennington, et al. v. United Mine Workers of America*, 250 F. Supp. 815 (E.D. Tenn., 1966). However, it is not argued that the parties had bargained to an impasse and the probative evidence before me would not sustain such a conclusion. In any event, a considerable amount of time had elapsed since the last prior meeting between the UMW and Sewanee members, with an intervening Board certification, and an offer by the UMW to bargain on all issues. No matter how the Sewanee group felt about the course of bargaining when negotiations were previously broken off, these circumstances required a resumption of bargaining upon request. It cannot be presumed that the UMW would have negotiated in bad faith.

gaged in coal operations by March 1963. In its brief, Products argues that "To the extent that Miss Boyls has made any contrary findings, such findings must be disregarded because they were and are not factually correct."

With respect to Sewanee's authority to act for Products, the only probative evidence in the record made before the present Trial Examiner is the testimony of UMW representative Turnblazer that after Products notified UMW that it had closed its mine, Products thereafter, "stated that Sewanee Coal Operators' Association would bargain for them." This testimony is undenied and is credited.[22]

In the original representation proceeding, it is shown that Products was named in the UMW petition as one of the operators which had authorized Sewanee to act for them in bargaining with the UMW, and no dispute was raised concerning this during that proceeding, although an issue was raised concerning Sewanee's authority to act for Grundy. Indeed, on page 342 of the record taken on June 21, 1963, counsel for Sewanee listed Products as a member of Sewanee.[23] The Board's Decision and Direction of Election in that proceeding, dated September 20, 1963, points out that Products, like Grundy and Consolidated, had conditioned Sewanee's negotiation with the UMW in their behalf on certification by the Board of UMW. As the Board found in its decision in connection with Grundy's membership in Sewanee, that condition has been met. It follows

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[22] In its brief, Products states: "Respondent Products has never denied that on or about November 16, 1962, it advised the Mine Workers as to the fact that Sewanee had been given a limited authorization to meet with the Union on Respondent Products behalf. While such authorization may have had or could have had certain legal consequences insofar as establishment of a bargaining unit on a multiemployer basis is concerned, it did not have, nor does it have the legal consequence of making Respondent a *member* of Sewanee Association."

[23] The formal papers in that proceeding contain an affidavit that Products was served by regular mail with notice of the hearing in that proceeding set for June 19, 1963 (Bd. exh. 1J).

from the Board decision that Products, as well as Grundy and Consolidated, became an unconditional member upon the accomplishment of the condition precedent stated. Trial Examiner Boyls, in her report to the Board, found Products to be a member of Sewance. It does not appear that any exceptions were filed to this finding.

With respect to Products' operations, it was stipulated in the representation proceeding that Products, as of June 1, 1963, had three employees, as the Board found in its Decision of September 20, 1963. It was also indicated at that hearing that these employees had been temporarily laid off and told that they would be recalled to work as soon as possible, this being dependent on Products being able to "get some coal." Although in the election among employees of members of Sewance approximately 80 of the challenged ballots were cast by persons claiming to be employees of Products, and the Regional Director's Report on Elections and Challenges states that Sewance claimed that Products, among others, had ceased operations before the Election, no claim was advanced on the record at the hearing before Trial Examiner Boyls on the challenged ballots that Products had not been a member of Sewance or had no employees.

In the circumstances of this record it is plain that Products was properly included in the unit within which the election was conducted, and that upon the certification of the UMW, Products became obligated to bargain with the UMW, jointly together with the other Respondents.

In the hearing before the present Trial Examiner, Henry Don Kohl, assistant secretary of Products, who clearly was not well acquainted with Products' mining operations, testified that Products had discontinued operations, of its coal mine as of January 31, 1962,[24] and ter-

[24] Kohl's reference to the "end of 1962" at transcript p. 87, ll. 20-21, should read "end of 1961," as Products exh. 2 makes clear.

minated all but one or two men, who were terminated in February or March 1963, when Products ceased purchasing coal. Kohl admitted that he had no personal knowledge of whether Products would or would not resume mining, itself.

This evidence presents no basis for Products' request that the Board's prior finding be overturned. The evidence presented is not newly discovered. There were two prior occasions—both before and after the election—upon which Products could have litigated its contention that it had terminated its employees.[25] It not only did not do so, but its agent Sewance represented to the Board that Products had three employees, indicated to be on temporary layoff. Since Products had discontinued the purchase of coal and laid these men off only after the beginning of the strike, a full year after it closed down its mine, it is plain that this layoff was the result of the strike, and was not due to the prior closing of Products' mine. In these circumstances, and considering Kohl's lack of familiarity with Products' mining operations, the Trial Examiner does not believe that Kohl's testimony that these men were "terminated" is necessarily inconsistent with their status being that of employees temporarily laid off because of the strike, as indicated in the representation proceeding. It is found that this latter status certainly continued through the time of the refusal and failure to bargain with the UMW on request.

3. *The allegations that UMW engaged in a competitive business.* Respondents other than Products request that judicial notice be taken of the findings of fact of the U. S. District Judge in *Pennington v. United Mine Workers, supra*, asserting that it was found as a fact that "during

[25] The Trial Examiner in this matter ruled that an alleged informal protest made to the Board's Regional Office by Products before the election was not material or probative.

a portion of this time United Mine Workers held substantial ownership of companies in competition with us." The General Counsel disputes that such findings were made. The UMW contends that it is not appropriate for the Trial Examiner to take as facts in this proceeding, matter determined in another proceeding, on different issues, and involving different parties.

While the Trial Examiner has serious doubts that findings of such nature, made in such circumstances, should be given the weight requested by Respondents, the issue has been duly considered in accordance with the request made. This task was made particularly difficult by the fact that the decision referred to is quite lengthy, dealing with legal theories not involved here, and no effort was made by Respondents to point out the parts of the decision relied upon or to argue the effect of the findings made.

Reference to the opinion of the Court indicates that while West Kentucky Coal Company, in which UMW held substantial financial interest, did, at one time, compete with operators in Marion, Grundy and Sequatchie counties to some extent for sales of coal to the Widows Creek plant of TVA, see 257 F. Supp. at 835, 845-846, 857-858, the UMW divested itself of its investment in this company about the last of September, 1963. See 257 F. Supp. at 849. In these circumstances, it must be held that Respondents failed to establish that during the times material to this proceeding the UMW was engaged in such competitive enterprises that it would not effectuate the policies of the Act to order Respondents to bargain with the UMW as the representative of the employees in the appropriate unit.

4. *The allegations that Respondents have been deprived of due process.* These arguments are advanced chiefly by Products. Products complains that the General Counsel has taken the position that this matter could be settled,

without litigation, only if all Respondents agreed to bargain jointly, thus allegedly preventing Products from settling the issues framed by the complaint against it separately from the other Respondents. The General Counsel's position, which apparently has been consistent throughout,[26] however, is merely that no one of the Respondents may unilaterally withdraw from the multiemployer unit at such a clearly inappropriate time. Such separation from the multiemployer unit, however, is possible through mutual consent of the employer and the union involved to bargain separately. See *Publicity Engravers, Incorporated*, 161 NLRB No. 16, cf. *N.L.R.B. v. Tower Iron Works, Inc.*, 366 F. 2d 189 (C.A. 1, 1966). Products has at no time indicated its willingness to bargain with UMW separately, but, to the contrary, has consistently denied any obligation to honor the Board's certification. On the basis of the circumstances obtaining here, and particularly for the reasons expressed by the Court in *N.L.R.B. v. Sheridan Creations, Inc.*, *supra*, and by the Board in *Southwestern Colorado Contractors Assn. etc.*, *supra*, the Trial Examiner finds no abuse of due process on the part of the General Counsel in asserting that Products could not unilaterally withdraw from the multiemployer unit.

For reasons discussed herein, there is also no merit to the further argument that Respondents were deprived of due process and the right to adequately defend by the alleged vagueness of the unit found by the Board or by the alleged confusing nature of the General Counsel's theory advanced in support of the complaint.

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[26] Respondents contend that the Regional Director refused to process individual separate charges against Respondents. Respondent Sewance Exhibit 2 shows that the UMW withdrew such individual charge filed in November, 1965.

F. *Conclusions as to Case No. 10-CA-6350*

From the above it is clear that all Respondents (except possibly New Floyd) received an adequate request to bargain with UMW during the certification year in accordance with the certification issued by the Board, and all failed or refused to do so. Timely service of the charges was had on all Respondents with the exception of New Floyd and the possible exception of Easy and Whitwell.[27]

There is no question, as a matter of practical fact, that the Respondents as a group, and individually, refused to honor the certification of the UMW, held aloof from the processes of collective bargaining as a method of resolving the disputes that were the causes of a considerable paralysis of operations in the coal fields of southeastern Tennessee, and thereby set at naught the policies of the law which seek to encourage the solution of just such disputes by the procedures of negotiation between the parties involved.

Collective bargaining is not always an easy tool for the resolution of difficulties, nor will it solve all problems, and particularly not to the satisfaction of all parties on all occasions. But this is not an accepted reason for spurning it when required by the law to negotiate. The bargaining process is a viable, time tested instrument for the adjustment of industrial disputes in a democratic society, and adaptable to the needs of the occasion where minds—on both sides—are willing to the task, and the intent of the participants is to solve the problem at hand in good faith. This task the UMW asserted it was willing to undertake, the occasion was proper and opportune for the effort, but Respondents plainly were unwilling to undertake the re-

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[27] The Trial Examiner would have reopened the record to determine the reason for the return of the charges sent to Easy and Whitwll, except for the resolution of the issues made hereinafter.

quired responsibility whereby the UMW request to negotiate could be validated.

For the reasons set forth herein, the Trial Examiner finds that the Respondents who failed or refused to bargain with the UMW (other than Sewanee) upon request, as set forth herein, and who were served with the charges in this matter within the certification year, thereby violated Sections 8(a)(1) and (5) of the Act.

Because of Respondents' past unilateral action undermining the stability of the unit and their further conduct in repudiation of the obligations imposed by law, and in frustration of the procedure of collective bargaining, it is necessary that a specific and particular remedy be applied in these circumstances, which will serve to stabilize the situation presented and effectuate the purposes of the Act. It is particularly essential that such remedy not permit the failure or refusal of one or more of Respondents to comply with the recommended order to serve a further frustration of the policies of the law.

It will therefore be recommended that all of the Respondents shall, jointly together with such other companies as come within the unit described by the Board, upon request, bargain with the UMW, in good faith, for a reasonable period, but not less than 12 months, and, if a collective-bargaining agreement is arrived at, reduce such agreement to writing and execute it, this recommendation being subject to the following exceptions and understandings:

1. The order will not apply to New Floyd and Sewanee. See *Southwestern Colorado Constructors Assn., supra; Electrical Contractors of Troy, Inc.* Although for reasons set forth above, no finding of violation of the Act is made with respect to Easy and Whitwell, it is manifestly necessary in the effectuation of the policies of the Act that these Respondents together with all other persons within

the unit description honor the certification of the UMW and bargain with it in good faith in an effort to resolve the disputes between them. Although the inadequacy of proof of service of the charges with respect to these two Respondents may preclude a finding of violation of the Act or the issuance of a cease and desist order against them, in the circumstances of this case, an order directing them to bargain *in the future* jointly together with other Respondents in the multiemployer unit is appropriate in these circumstances, in order to effectuate the policies of the Act. Cf. *N.L.R.B. v. Joe Caldera and Mike Caldera d/b/a Falstaff Distributing Company*, 209 F. 2d 265, 268-269 (C.A. 8, 1954) (holding that although a cease and desist order was not justified in the absence of proof of a past request to bargain and refusal by respondents there, an order to bargain *in the future* was justified by Board's finding that the union there involved was the representative of the employees in the unit).

2. In the event that less than all Respondents or those obligated to bargain with the UMW in accordance with the decision of the Board, agree to bargain with the UMW upon request as required by the Order recommended herein, the UMW, of course, may agree to bargain separately with those persons covered by the unit who agree to comply with the Order. Cf. *Publicity Engravers Incorporated supra*. This, obviously, shall not relieve the obligation to bargain as part of the multiemployer unit, when circumstances permit.

3. The Board's description of the unit includes all former members of Sewanee and their successors in interest, excluding only those members who do not resume operations as described by the Board. Respondents' contention that this description is so incomplete as to preclude bargaining mistakes the situation. The Board's finding provide a unit which is definite and ascertain-

able at each stage at which the obligation to bargain is to be fulfilled, but which also provides for necessary continuity and stability in a shifting industrial environment.

As shown by their appearance and participation in these proceedings (except Cardell, New Floyd and Sewanee) all of the Respondents are in existence, and all (except possibly New Floyd and Sewanee) are before the Board, and subject to its jurisdiction in this proceeding. Obviously, as previously found, all (except New Floyd and Sewanee) are presently obligated to carry out the obligation required by the Board's certification of UMW. The mere fact that a Respondent was not operating at the time of the prior request to bargain, or is not now operating, is not sufficient, for reasons previously stated to absolve such Respondent from the obligation to bargain with the UMW as the designated representative of the employees in the unit. However, if any such Respondent continues completely inoperative and outside the unit as described by the Board—a situation within the control of such Respondent—it may avoid the obligation imposed by the Order hereinafter recommended. This is a matter to be determined, if necessary, in compliance proceedings before the Board. See *Terrace Lumber Company*, 154 NLRB 1109, footnote 2; Cf. *Employer's Assn. of Bldg. Metal Fabricators, etc. supra.*

G. *Case No. 10-CA-6172*

It is admitted that H. Willis Flynn, the sole owner of Respondent Flynn, about December 1963, formed Respondent Sycamore, which under the name and style of Poplar Coal Company, Inc., on or about April 14, 1965, began operating a mine entry in the geographic area involved here. It has previously been found that both Respondents Sycamore and Poplar are within the unit described by the Board in the representation proceeding. The mine

involved apparently is the same mine which Flynn in testimony before Trial Examiner Boyls on June 17, 1964, stated he had opened with assistance from Grundy, or while he was working for Grundy.

It is further admitted that Sycamore under the trade name and style of Poplar on or about July 16, 1964, recognized Southern Labor Union as the bargaining representative of its production and maintenance employees at the mine in question and executed a 3-year collective bargaining agreement with that union covering those employees and has continued to maintain that agreement in force and effect.

The orginal charge in Case No. 10-CA-6172 was filed on July 1, 1965, and served on July 9, 1965.

In its separate brief, Respondent Sycamore, in addition to the defenses set forth in Case No. 10-CA-6350, argues that the complaint in this part of the proceeding must be dismissed under the provisions of Section 10(b) of the Act. It asserts that since the charges were filed and served more than 6 months after the execution of the agreement, the validity of the agreement at the time of its execution is not subject to attack. Respondent Sycamore further contends that under the holding of the Supreme Court in *Local Lodge No. 1424, I.A.M. (Bryan Mfg. Co.) v. N.L.R.B.*, 362 U.S. 411, since no illegality was shown to exist on the face of the agreement, the mere maintenance of the agreement thereafter cannot be held to be a violation of the Act.

In the *Bryan* case, the employer signed a collective bargaining agreement with the I.A.M. containing a provision requiring union membership at a time when that union did not represent a majority of the employees in the unit. Charges attacking the employer's recognition of and contract with the I.A.M. were not filed until more than 6 months after the execution of the agreement. It was

conceded that the 6 month limitation of Section 10(b) precluded a finding that the Act had been violated by the execution of the agreement, but it was contended that the continued maintenance and enforcement of that agreement within the 6-month period prior to the filing of the charges constituted a violation of the Act supporting the Board's order striking down the agreement in that case. The Court disagreed, reasoning that since the agreement was legal on its face, and no other independent or continuing event existed within the limitation period affecting the validity of the agreement, the only evidence of its illegality was that it had been illegally executed, a finding that the Board was barred from making by the provisions of Section 10(b) of the Act. To permit the time-barred event to be so used, the Court stated, "in effect results in reviving a legally defunct unfair labor practice" (362 U.S. at 417), which would be contrary to the Congressional policies expressed in the Act.

However, the Court made it clear that its decision in *Bryan* was limited to the situation there presented, stating ". . . we need not go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the 10(b) proviso" (362 U.S. 1119). Appended to this sentence is a footnote which is highly relevant to the situation before us here, reading as follows:

> *Katz* v. *N.L.R.B.*, 196 F. 2d 411, and *N.L.R.B.* v. *Gaynor News Co.*, 197 F. 2d 719, relied on below and in dissent here, arose under provisions of the Act . . . which permitted union security agreements only with unions which possessed a Board certificate that a union security clause had been authorized at a special election of the employees involved. While the language, and perhaps the approach, of these cases may be considered inconsistent with the principles we deem governing here, the decisions on their facts

present no such difficulty." Proof of the non existence of such a certificate, *which of course was a continuing fact*, plainly did not require resort to testimony about past events; rather the issue was much like one arising out of an agreement illegal on its face, the only difference being that a separate instrument was involved. (emphasis added)

In the present situation, in like case, irrespective of the situation under which the agreement with Southern Labor Union came into existence, that agreement is now and has been inconsistent with *the continuing certification* of UMW and Sycamore's continuing obligation to recognize and bargain with UMW as the exclusive representative of its employees. In fact, the continuing maintenance of the agreement constitutes a continuing refusal to recognize the obligation required by the Board's certification, which, within the distinction made by the Court in *Bryan*, is "a continuing fact," contained in a separate instrument rendering the agreement with Southern Labor Union illegal, quite apart from evidence as to the context in which that agreement was executed.

For the reasons stated, Respondents' contention that the complaint in Case No. 10-CA-6172 is barred by Section 10(b) of the Act must be rejected. It is therefore found that Respondent Sycamore and Respondent Poplar by maintaining its collective-bargaining agreement with Southern Labor Union after January 8, 1965, violated Sections 8(a)(1) and (2) of the Act.[28]

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[28] It may be noted that quite apart from the finding that Respondents violated the Act by maintaining this agreement, it is quite clear that the continued maintenance of the agreement would be completely incompatible with the obligation of Sycamore and Poplar to bargain with UMW on request which has previously been found, and it would be necessary in the effectuation of those findings to order that Sycamore and Poplar cease and desist from recognizing Southern Labor Union as the representative of employees in the appropriate unit and from giving effect to the agreement with that union.

IV. Conclusions of Law

1. The Respondents, other than New Floyd, are engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. UMW and Southern Labor Union are labor organizations within the meaning of Section 2(5) of the Act.

3. The unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act is the following: "All production and maintenance employees of coal mining operators who were formerly members of Sewanee Coal Operators Association, including those not operating but who resume operating old mines before or after the conclusion of the strike, and including also those individuals who had sole or controlling interest in a corporation which was a member of Sewanee Coal Operators Association who form another corporation and operate a new or different mine in Marion, Grundy and Sequatchie counties in Tennessee, excluding office clerical employees professional employees, technical employees, owner-operators, mine foremen, and other supervisors as defined in the Act."

4. Since on or about June 7, 1965, UMW has been and continues to be the exclusive representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondents named in footnote 1 herein, except Sewanee, New Floyd, Easy and Whitwell have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. Respondents Poplar and Sycamore have engaged in and are engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (2) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

V. The Remedy

It having been found that certain of the Respondents herein have violated the Act and; for reasons set forth hereinabove, certain particular remedies being required in the circumstances, the following order, which is necessary to effectuate the policies of the Act, is recommended:

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, the Respondents set forth in footnote 1 above, with the exception of Sewanee and New Floyd, their officers, agents, successors[29] and assigns, shall:

1. Cease and desist from:[30]

(a) Refusing to bargain collectively with United Mine Workers of America as the exclusive bargaining representative of the employees in the appropriate unit set forth hereinabove, jointly together with the other Respondents (except Sewanee and New Floyd), or together with other persons within the description of the appropriate unit, or separately, as may be mutually agreed upon between the Respondents, or any of them, and the UMW.

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[29] In the circumstances of this case the term "successor" shall include any operators of coal mines in Marion, Sequatchie and Grundy counties in Tennessee formed or controlled by a person who had sole or controlling interest in one of Respondents during or since September, 1962 (the date of the formation of Sewanee).

[30] The provisions of subparagraph 1 of the recommended order shall not apply to Respondents Easy and Whitwell.

(b)[31] Recognizing Southern Labor Union as the representative of employees in the appropriate unit set forth above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act, as long as that union has not been certified by the Board as such representative, and from giving effect to the collective-bargaining agreement entered into with Southern Labor Union on or about July 16, 1964, for a 3-year term, or to any extensions, renewals or modifications thereof, or any other contract or agreement between Respondent Sycamore and Poplar and the said labor union which may now be in force; provided, however, that nothing in this recommended order shall require either Respondents Sycamore or Poplar to vary or abandon any wages, hours, seniority, or other substantive feature of its relations with its employees which said Respondents have established in the performance of the aforesaid agreement, or to prejudice the assertion by employees of any rights they may have thereunder.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Mine Workers of America as the exclusive bargaining representative of employees in the appropriate unit set forth hereinabove, jointly together with the other Respondents (except Sewanee and New Floyd), or together with other persons within the description of the appropriate unit, or separately, as may be mutually agreed upon between

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[31] The provisions of this subparagraph (b) shall be applicable only to Respondents Sycamore and Poplar, their officers, agents, successors, and assigns.

the Respondents, or any of them, and the UMW, for a reasonable period, but not less than 12 months, and if an agreement is reached, embody such understanding in a signed agreement.

(b)[32] Withdraw and withhold recognition from Southern Labor Union as the collective bargaining representative of employees in the appropriate unit set forth above, unless and until the Board shall certify Southern Labor Union as such representative.

(c) Post at the mines presently operating and mail to the employees not working because of layoff or the current strike at their last known address, copies of the attached notice marked "Appendix A," except that Respondents Sycamore and Poplar shall post and mail copies of the attached notice marked "Appendix B."[33] Copies of said notices, to be furnished by the Regional Director for Region 10, after being signed by the appropriate Respondent's representative, shall be mailed and posted by the appropriate Respondent, as herein provided, immediately upon receipt thereof, such posting to be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

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[32] The provisions of this subparagraph (b) shall apply to Respondents Sycamore and Poplar, their officers, agents, successors, and assigns.

[33] In the event that these Recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notices. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(d) Notify the Regional Director for the Tenth Region, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order what steps have been taken to comply therewith.[34]

Dated at Washington, D. C.

/s/ Sidney J. Barban
Trial Examiner

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[34] In the event that these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX C

United States of America

Before the
National Labor Relations Board

Sewanee Coal Operators' Association, Inc.
Employer
Case No. 10-RC-5497
and
United Mine Workers of America
Petitioner

Grundy Mining Company
Employer
Case No. 10-RC-5593
and
Local No. 139, Southern Labor Union
Petitioner

M. A. Payne, Inc.
Employer
Case No. 10-RC-5604
and
Local No. 139, Southern Labor Union
Petitioner

Stephenson Bros. Coal Co., Inc.
Employer
Case No. 10-RC-5605
and
Local No. 139, Southern Labor Union
Petitioner

Decision and Direction of Election

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, a consolidated hear-

ing was held before Kathryn M. Rossback, hearing officer.[1] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel.

Upon the entire record in these cases, the Board finds:

1. The Employers are engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employers.

3. A question affecting commerce exists concerning the representation of employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. UMW seeks to represent in a single unit all production and maintenance employees of the employers who are members of Sewanee Coal Operators' Association, herein called Sewanee.[2] SLU seeks to represent the employees of Grundy, Payne, and Stephenson, members of Sewanee, in

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[1] These cases were consolidated by order of the Regional Director for the Tenth Region, dated June 12, 1963. United Mine Workers, herein called UMW, Petitioner in Case No. 10-RC-5497, intervened in Case Nos. 10-RC-5593, 10-RC-5604, and 10-RC-5605, while Petitioner in these cases, Local No. 139, Southern Labor Union, herein called SLU, intervened in Case No. 10-RC-5497. The names of the employers and Petitioners appear as corrected at the hearing.

[2] UMW's alternative unit contention is that there should be two separate units comprising all the leased mines located on Consolidated's property, and all leased mines located on Product's property. UMW also contends that if the nine mines in the Grundy operation are excluded from any of its foregoing proposed units, they should be divided into two separate units, one unit comprising the eight nonmechanized mines averaging ten employees each, and the other unit comprising the so-called No. 11 mine which is a mechanized operation with approximately forty employees.

three separate units. Sewanee contends that the employees of each of its member companies should constitute a separate unit.

Approximately 30 of the 33 members of Sewanee operate coal mines on property owned either by Tennessee Consolidated Coal Company or by Tennessee Products and Chemical Corporation, hereinafter referred to respectively as Consolidated and as Products, pursuant to leases from these two companies. The remaining three members operate mines on property of other owners. Consolidated and Products do not operate any mines themselves, although Products has three tipple employees and Consolidated has a contractual arrangement with Grundy Mining Company, its wholly owned subsidiary, which operates nine mines on Consolidated property.[3]

In addition to acting as lessors Consolidated and Products each act as sales agents for the coal mined by the independent operator lessees on its property. For this service they receive a royalty on the tonnage delivered. They sell coal mainly to the Tennessee Valley Authority. As a further service to the lessees, Consolidated and Products furnish the performance bond required by TVA.

Consolidated, Products, their lessees, and the three independent operators, have recognized UMW as the representative of their mine employees since at least 1950. Until 1958, Consolidated and Products bargained with UMW through Southern Tennessee Coal Producers Association, of which they were members. The bargaining procedure appears to have been for the president of Southern Tennessee Coal Producers Association to sign the negotiated

[3] Consolidated had itself operated mines located on its own land before 1960. In 1961, it leased these mines to the Allen and Garcia Company, an independent lessee, which then operated with its own employees, under the existing UMW contract. Grundy then took over Allen and Garcia's operations in 1962 and assumed the latter's contract with UMW.

agreement, and for each association member to sign a separate but identical agreement. The lessees of Consolidated and Products, as well as the independent operators, who were not members of that Association, thereupon also signed separate but identical agreements with UMW. The latest agreements were executed in 1958 and terminated in 1962, except that six of these agreements appear to have continued in force.

In September 1962, the lessees and the independent operators formed the Sewanee Coal Operators Association. As stated in its charter, the Association was incorporated for the purposes, among others, of acting as the exclusive bargaining agent for all members of Sewanee in union negotiations, entering into collective-bargaining agreements, and aiding in their enforcement.

Between September 1962 and January 1963, UMW and Sewanee held four meetings for the purpose of negotiating a new contract. The parties were unable, however, to reach any agreement. In February 1963, UMW filed the instant petition seeking an election among the employees in a multiemployer unit comprised of all members of Sewanee, including Grundy Mining Company. SLU subsequently filed its petition seeking to represent all the employees at the nine Grundy Mines in a single unit. At the hearing in the instant case Grundy contended that its employees should be in a separate unit because it is only a conditional member of Sewanee. Sewanee argues that the employees of each of its members should be in individual employer units because of their past practice of executing separate contracts with UMW.

We consider first Sewanee's contention that there is no controlling history of bargaining on a multiemployer basis. To support that contention, Sewanee relies primarily on the practice of the employers to sign separate, though identical, agreements with the Union. But that

circumstance is not necessarily decisive in determining whether an appropriate multiemployer unit has been established. Association-wide units may be appropriate even though separate contracts are signed,[4] or multiemployer bargaining has been conducted on the basis of an informal association.[5] The test is whether the employer parties have manifested an intent to be bound by group rather than individual action.[6] In the circumstances here, we believe that test is met. In the past the same employers who now constitute the membership of Sewanee had agreed to be bound by the identical agreement that Consolidated and Products had negotiated through Southern Tennessee Coal Producers Association. The bargaining history also reflects that the intent on the part of the companies to bargain on a multiemployer basis is a continuing one. This is clearly evidenced by the fact that in 1962 the employers who had theretofore engaged in informal joint bargaining banded themselves into a formal association whose charter reveals the intention of its members to adhere to multiemployer bargaining. And it is confirmed by the fact that Sewanee on behalf of its members actually entered into negotiations with the UMW on a multiemployer basis. In view of this background manifesting the intention of Sewanee's members to bargain jointly, we find, in agreement with the UMW, which by its petition as well as by its prior course of bargaining has manifested a similar intent, that an association-wide unit is appropriate at this time.

We consider next the issue whether Grundy's employees should be included in the association unit or should constitute a separate unit. Grundy argues that it should

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[4] *Belleville Employing Printers*, 122 NLRB 350.

[5] *Harbison-Walker Refractories Company*, 137 NLRB 1686.

[6] *The A. B. Hirschfield Press, Inc.*, 140 NLRB No. 35.

not be included in the unit with other members of Sewanee because at the time of its application for admission into that association it withheld from Sewanee final authority to bargain on its behalf.

As appears from the minutes of a meeting of Sewanee held in October 1962, Grundy, Consolidated, and Products at that time requested permission to become members of Sewanee, but on the condition ". . . that the association would not negotiate for Tennessee Consolidated Coal Company, Grundy Mining Company, and Tennessee Products and Chemical Corporation until the United Mine Workers had been duly certified by a Board election."

At the hearing herein, both a UMW representative and an official of the Grundy Mining Company testified that at the first bargaining session between Sewanee and UMW a representative of Grundy stated that Grundy was not to be considered bound by the negotiations until "a union" was certified.

The critical question here, therefore, concerns the effect to be given to Grundy's conditional application for membership in Sewanee. At first glance, Grundy's action might suggest that it did not want to be bound by group bargaining. But the very fact that it sought admission in a multiemployer association indicates its interest in participating in collective bargaining on a multiemployer basis. Moreover, Grundy did not indicate either to other members of Sewanee or to UMW, at any time after requesting membership, or after bargaining commenced, that it no longer wished to become a member, or that it desired to pursue an individual course of bargaining. We also note that included in the contract proposed to UMW by Sewanee was a mine classification styled "A," describing a relatively large, mechanized mine such as only Grundy operates. In these circumstances, we construe Grundy's action as manifesting an intention to join Sewanee and to

be represented by it subject only to the condition of union certification on an association-wide basis. That the condition contemplated a certification based on an election in an association-wide unit also finds support in the minutes of the Sewanee meeting, adverted to above, where Products, Grundy, and Consolidated are listed *in the conjunctive* as imposing the condition. Moreover, as Consolidated has no employees of its own, a union would have to be certified on the basis of an election in an association-wide unit, including the three named companies, for Products, Grundy *and* Consolidated to become unconditional members of Sewanee.

Thus, only a Board election conducted in an association-wide unit will determine whether Grundy will be bound by group bargaining. If a union is certified as the representative of all employees in the unit, Grundy will thereby become a member to the same extent as the other members of Sewanee. On the other hand, if no union is certified, Grundy's application for membership will lapse by reason of the failure of the condition. Therefore, since the question concerning Grundy's membership in Sewanee can only be settled by an election in an association-wide unit, we shall include Grundy in the unit found appropriate herein.

Accordingly, we find that a unit comprising the employees of all members of Sewanee Coal Operators' Association, Inc., including Grundy Mining Company, is appropriate. We further find that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act: All production and maintenance employees of employer members of Sewanee Coal Operators' Association, Inc., excluding office clerical employees, professional employees, technical employees, guards, owner-operators, mine foremen, and other supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented, for collective-bargaining purposes, by United Mine Workers of America, or by Local No. 139, Southern Labor Union, or by neither.

Dated, Washington, D. C. September 20, 1963.

Frank W. McCulloch, Chairman
Boyd Leedom, Member
John H. Fanning, Member
(Seal) National Labor Relations Board

BOYD LEEDOM, MEMBER, dissenting in part:

I agree with my colleagues that a multiemployer unit is appropriate. However, I construe Grundy's currently qualified application for membership in Sewanee as conditioned upon separate certification of a union as the majority representative of Grundy's employees. I would, therefore, direct a self-determination election among Grundy's employees. If they select the same bargaining representative chosen by a majority of the employees in the multi-employer unit, I would include them in that unit. On the other hand, in the event Grundy's employees select a different representative, or no representative, they would be excluded from the multiemployer unit and either constitute a separate appropriate unit, or be unrepresented.

Dated, Washington, D. C.

Boyd Leedom, Member
National Labor Relations Board

APPENDIX D

United States of America:

Before the
National Labor Relations Board

Sewanee Coal Operators' Association, Inc
Employer

and Case No. 10-RC-5497

United Mine Workers of America
Petitioner

Grundy Mining Company
Employer

and Case No. 10-RC-5593

Local No. 139, Southern Labor Union
Petitioner

M. A. Payne, Inc.
Employer

and Case No. 10-RC-5604

Local No. 139, Southern Labor Union
Petitioner

Stephenson Bros. Coal Co., Inc.
Employer

and Case No. 10-RC-5605

Local No. 139, Southern Labor Union
Petitioner[1]

[1] The parties are hereinafter referred to as follows: Sewanee Coal Operators' Association, Inc., as Sewanee; Grundy Mining Company, as Grundy; M. A. Payne, Inc., as Payne; Stephenson Bros. Coal Co., Inc., as Stephenson; United Mine Workers of America, as UMW; and, Local No. 139, Southern Labor Union, as SLU.

Supplemental Decision and Order

Pursuant to the Board's Decision and Direction of Election issued on September 20, 1963,[2] an election by secret ballot was conducted on October 15, 1963, under the direction and supervision of the Regional Director for the Tenth Region, among employees in the appropriate unit. Upon the conclusion of the balloting, the parties were furnished with a tally of ballots which showed that of approximately 660 eligible voters, 579 cast ballots, of which 108 were for UMW, 50 were for SLU, none were against the participating labor organizations, and 421 were challenged. The challenged ballots are sufficient in number to affect the results of the election. Thereafter, Grundy and SLU filed timely objections to conduct affecting the results of the election. On December 23, 1963, Sewanee filed a petition requesting that the Board amend its Decision of September 20, 1963, and specifically spell out the names of the coal companies in business whose employees are entitled to vote as members of Sewanee Coal Operators Association. UMW filed a response thereto.[3]

In accordance with the Board's Rules and Regulations, the Regional Director conducted an investigation, and, on December 17, 1963, issued and served upon the parties his report on objections and challenged ballots, in which

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[2] Not published in NLRB volumes.

[3] In its petition, Sewanee offered to show that some 18 coal companies are no longer in business but remain members of Sewanee, and that only 12 among approximately 30 members of Sewanee remain in, and intend to remain in business. In view of our decision herein overruling the objections we hereby deny the request to amend the unit for purposes of eligibility to vote. However, Sewanee will have opportunity, at the hearing hereinafter ordered, to establish the operational status of any company as of the time of the election insofar as such status may be germane to determining the eligility of any challenged voter.

he recommended that certain portions of the objections be sustained and the remainder overruled, that a hearing be held before a Trial Examiner to resolve issues raised by the challenges, and that the election be set aside and a new one directed, subsequent to the hearing. Thereafter, UMW filed timely exceptions to the Regional Director's report, and a supporting brief.

The Board has considered the Regional Director's report, and the exceptions thereto, and the entire record in the case, and makes the following findings:

UMW excepted to the Regional Director's recommendations to sustain the portions of the objections relating to pre-election violence and to electioneering and crowding of people at the polls.

The alleged pre-election violence related to two incidents which occurred in April and May 1963, more than 5 months before the election. Each incident was the subject of separate charges, which resulted in findings of Section 8(b)(1)(A) coercion.[4] As found by the Trial Examiner in those two cases, on April 24, 1963, UMW, Local 7244 and its supporters engaged in mob threats and violence against employees of Grundy to prevent them from meeting to organize and elect officers for a Grundy local of SLU; and on May 7, 1963, UMW, Local 7083 and its supporters engaged in mob threats and violence to prevent Grundy strike replacements from going to work at the Grundy minesite.

These two incidents occurred in the context of an economic strike called by UMW against Grundy commencing

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[4] *United Mine Workers of America, Local No. 7083*, 146 NLRB No. 20; and *United Mine Workers of America, Local No. 7244*, 146 NLRB No. 29. In each case the Trial Examiner's Decision, later adopted by the Board, had issued prior to the issuance of the Regional Director's report herein.

December 26, 1962; UMW's petition herein, filed February 25, 1963, for a multiemployer unit of Sewanee members' employees' including Grundy's; and UMW's charges of unlawful assistance by Grundy to an independent union, which charges, under Board practice, blocked the processing of UMW's representation petition. On May 20, 1963, a settlement agreement with respect to UMW's charges of Section 8(a)(2) assistance was approved by the Regional Director, and on May 23, 1963, SLU filed its petition herein seeking a separate unit of Grundy employees. The Board found a multiemployer unit, including Grundy, to be appropriate, in the event a majority of employees in such unit voted for UMW or SLU, and, as above indicated, the election was conducted on October 15, 1963.

Unlike the Regional Director, we conclude that in the circumstances above outlined, UMW's strike misconduct, found violative of the Act, could have no substantial impact on voter free choice in the election. In view of the lapse of more than 5 months from the occurrence of the strike violence in question to the holding of the election, and the absence of any showing that in this interval of time any other coercive conduct was directed at employees in the unit, we find that the incidents relied on in the objections were unrelated to the election and too remote to have a probable effect upon the election.[5]

As to those portions of the objections relating to electioneering and crowding at the polls, the Regional Director found that a large number of persons including strikers, nonstrikers, replacements and others congregated on the sidewalk and street immediately outside the polling place before and during the polling period. The election was conducted in a vacant store on courthouse square at

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[5] See, e. g., *Southdown Sugar, Inc.*, 108 NLRB 114, *Krambo Food Stores, Inc.*, 101 NLRB 742, 743; *The LaClede Gas Light Co.*, 80 NLRB 839, 841.

Jasper, Tennessee,[6] on a day the Criminal Court was in session. Four Board agents conducting the election were assisted by two U. S. Marshals. The crowd was estimated to number from 200 to 2000 at various times, with a line of voters four to six deep extending from the entrance of the polling place down the sidewalk for a block or more. While the polls were opened, several unidentified persons circulated about the voting line outside the polling place wearing placards reading "VOTE FOR UNITED MINE WORKERS AND BE ABLE TO GET A PENSION." The Board Agent did not specify any "no electioneering area" but did caution representatives not to enter the polling place during the election. The Regional Director based his finding concerning crowding upon pictorial evidence submitted during investigation.[7] However, he does not point to any specific incidents of disorderliness or coercive conduct but merely couples the evidence of electioneering and crowding immediately outside the polling place with the much earlier incidents of strike violence which we have found to be too remote to have an effect upon the election.

We conclude that, under the facts here, the presence of a crowd or a massing of voters at the entrance to the polling place and the placard electioneering by unidenti-

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[6] Jasper was selected as the site of the election in part because it had not been the scene of any pre-election violence and adequate law enforcement was available. The site was suggested by attorneys for Sewanee and Grundy and approved by the Regional Director.

[7] In its exceptions, UMW asserts that it knows of only four pictures taken of the election and attached those pictures to its brief. The pictures appeared in area newspapers, and the accompanying stories described the crowd as orderly and the election as without disorder. In addition, UMW attached affidavits from law enforcement officers, merchants, county officials and other citizens of Jasper who observed the election and found it proper and orderly.

fied persons on behalf of UMW in the area outside the polls, standing alone, did not impair the exercise of free choice in the election. In view of the foregoing, we hereby overrule the objections in their entirety.[8]

Accordingly, we shall direct that a hearing be held before a Trial Examiner of the Board to resolve the issues raised by the 421 challenged ballots herein.

ORDER

IT IS HEREBY ORDERED that a hearing be held before a Trial Examiner to be designated by the Chief Trial Examiner on the issues raised by the 421 challenged ballots.

IT IS FURTHER ORDERED that the Trial Examiner designated for the purposes of conducting the hearing, shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within 10 days from the date of issuance of such report, any party may file with the Board in Washington, D. C., an original and six copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve copy thereof upon each of the other parties, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Trial Examiner.

IT IS FURTHER ORDERED that the above-titled matter be, and it hereby is, referred to said Regional Director for the purpose of conducting such hearing, and that

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[8] Absent exceptions, we adopt *pro forma*, the Regional Director's recommendations to overrule certain portions of the objections, as well as his recommendations for a hearing as to the challenges.

the Regional Director be, and he hereby is, authorized to issue early notice thereof.

Dated, Washington, D. C. April 28, 1964.

Frank W. McCulloch, Chairman
Boyd Leedom, Member
John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

United States of America

Before the
National Labor Relations Board

Sewanee Coal Operators' Association, Inc.
Employer

and Case No. 10-RC-5497

United Mine Workers of America
Petitioner

Grundy Mining Company
Employer

and Case No. 10-RC-5593

Local No. 139, Southern Labor Union
Petitioner

M. A. Payne, Inc.
Employer

and Case No. 10-RC-5604

Local No. 139, Southern Labor Union
Petitioner

Stephenson Bros. Coal Co., Inc.
Employer

and Case No. 10-RC-5605

Local No. 139, Southern Labor Union
Petitioner

Order

On April 28, 1964, the Board issued a Supplemental Decision and Order[1] in the above-entitled proceeding[2] in which, in the absence of exceptions thereto, it adopted, *pro forma*, the Regional Director's recommendations, as contained in his Report on Objections and Challenged Ballots dated December 17, 1963, to overrule certain portions of the objections, and his recommendations with respect to the challenges, and directed a hearing on the issues raised by the 421 challenged ballots. However, unlike the Regional Director, it concluded that UMW's strike misconduct was too remote to have any substantial impact on voter free choice in the election conducted herein on October 15, 1963, and that the presence of crowds at the entrance to the polling place, and the electioneering in the area outside the polls did not impair the exercise of free choice in the election. Therefore, it overruled all objections to conduct affecting the results of the election filed by SLU and by Grundy.

Thereafter, on May 11, 1964, Grundy filed a petition for reconsideration and motion to reopen the record. It requested the Board to set aside the Order of April 28, 1964, and to affirm the recommended action of the Regional Director by ordering a new election after the eligibility of voter is settled. In the alternative, Grundy requests that a hearing be held to afford it an opportunity to introduce evidence in support of alleged misconduct. Grundy also moves that the Board reopen the original record to receive evidence of occurrences since said hearing which, it alleges, substantially affect the propriety of the unit. If the

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[1] 146 NLRB No. 140.

[2] Hereinafter, certain parties are referred to as follows: Local No. 139, Southern Labor Union, as SLU; Grundy Mining Company, as Grundy; and United Mine Workers of America, as UMW.

Board denies both its petition and motion, Grundy requests the Board to determine the bargaining agent of its employees independently of all other employers. On May 18, 1964, UMW filed a response in opposition to Grundy's petition and motion.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the petition for reconsideration and motion to reopen the record, including the alternative requests contained therein, be, and they hereby are, denied as lacking merit.

As to the alleged incidents occurring subsequent to UMW's aforementioned strike misconduct, the Board—without in any way condoning them—found lacking in merit the argument that such incidents, involving acts by unidentified individuals, together with the earlier UMW strike misconduct, destroyed the election atmosphere. In the Board's opinion, such incidents, viewed as third party conduct, were not aimed at influencing the choice of Grundy employees in the election and any indirect effect they may have had was not, in all the circumstances, of such impact as to warrant setting aside the election.

IT IS FURTHER ORDERED that, to the extent that the facts alleged may affect the disposition of the challenges, or to the extent that alleged events occurring after the election relate to changes in the composition, or the continued existence, of, the unit found appropriate, the scope of the hearing set for June 16, 1964, is broadened to permit the introduction of such evidence.

Dated, Washington, D. C., June 11, 1964.

By direction of the Board:

George A. Leet
Associate Executive Secretary

APPENDIX E

United States of America

Before the
National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Sewanee Coal Operators' Association, Inc.
Employer

and Case No. 10-RC-5497

United Mine Workers of America
Petitioner

Grundy Mining Company
Employer

and Case No. 10-RC-5593

Local No. 139, Southern Labor Union
Petitioner

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Local No. 139, Southern Labor Union
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Stephenson Bros. Coal Co., Inc.
Employer

and Case No. 10-RC-5605

Local No. 139, Southern Labor Union
Petitioner

Judson Harwood, Esq., of Nashville, Tenn., for Grundy Mining Company, Employer.

William M. Ables, Jr., Esq., of South Pittsburg, Tenn., for Sewanee Coal Operators Association, Inc., M. A. Payne, Inc., and Stephenson Bros. Coal Co., Inc., Employers.

E. H. Rayson, Esq., of Knoxville, Tenn., and *Willard P. Owens, Esq.*, of Washington, D. C., for United Mine Workers of America, Petitioner.

Kathryn Rossback, Esq., of Atlanta, Ga., for the Regional Director, Tenth Region, National Labor Relations Board.

Before: *Fannie M. Boyls*, Trial Examiner.

Trial Examiner's Report on Challenged Ballots and Events Affecting Composition of Unit

On April 28, 1964, the Board issued an Order directing that a hearing be held before a Trial Examiner to resolve the issues raised by 421 challenged ballots, and that said Trial Examiner issue a report containing findings of fact and recommendations to the Board relative to the disposition of those issues. On June 11, 1964, the Board issued a further Order broadening the scope of the hearing before the Trial Examiner to include an inquiry into alleged occurrences after the election of October 15, 1963, which might be relevant to the composition, or the continued existence, of the unit found appropriate.

Pursuant to these orders, a hearing was held before the undersigned Trial Examiner at Chattanooga, Tennessee, on June 16 and 17, 1964. Thereafter, briefs were filed by counsel for the United Mine Workers of America (herein called the UMW), by counsel for Grundy Mining Company (herein called Grundy), and by counsel for Sewanee Coal Operators' Association, Inc. (herein called Sewanee), M. A. Payne, Inc. (herein called Payne), and Stephenson Bros. Coal Co., Inc. (herein called Stephenson). Each brief has been carefully considered.

Upon the entire record in this proceeding and from my observation of the witnesses in the hearing before me, I hereby make the following:

Findings of Fact

I. Prior steps in this proceeding

Although an attempt will be made to avoid any unnecessary repetition of prior contentions of the parties and findings of the Regional Director and Board in this proceeding, a brief recitation of prior steps and findings which may be helpful to an understanding of the issues will be set forth below.

1. In September, 1962, approximately 33 coal mining operators in the southeast Tennessee area formed Sewanee Coal Operators' Association, Inc. for the purpose, at least in part, of bargaining collectively as a multiemployer group. Between September 1962 and January 1963, Sewanee engaged in collective bargaining with the UMW.

2. On December 26, 1962, the UMW called a strike, as a result of which the mines of all the operator members of Sewanee were shut down. Grundy resumed operations in May 1963.

3. On February 25, 1963, the UMW filed a representation petition with the Board, seeking an election in the employerwide bargaining unit composed of the employees of the members of Sewanee.

4. On May 23 and June 6, 1963, the Southern Labor Union (herein called SLU) filed representation petitions with the Board, seeking an election in single employer units consisting of the employees of Grundy, of Payne, and of Stephenson.

5. Following a hearing on the consolidated cases, the Board on September 20, 1963, issued its Decision and Direction of Election, finding a multiemployer bargaining unit consisting of the employees of members of Sewanee appropriate, and directing an election in that unit.

6. On October 15, 1963, the election was held. The tally of ballots showed that 579 of the 660 voters cast ballots, of which 108 were for the UMW, 50 were for SLU, none was against the participating labor organizations, and 421 were challenged. There were, however, only 280 employees listed on the eligibility list furnished by Sewanee and of these, 199 cast ballots. With respect to Grundy, 108 of its 155 employees listed on the eligibility list voted.

7. On October 21, 1963, Grundy and SLU filed objections to the election.

8. On December 17, 1963, the Regional Director issued his Report on Objections and Challenged Ballots, recommending that certain portions of the objections relating to alleged preelection violence be sustained, and that the remainder be overruled; that a hearing be held before a Trial Examiner to resolve the issues raised by the challenges; and that the election be set aside and a new one directed subsequent to the hearing.

9. On December 23, 1963, Sewanee filed a petition requesting the Board to amend its Decision of September 20, 1963, and specifically spell out the names of the coal companies in business whose employees were entitled to vote as members of Sewanee. UMW filed a response thereto.

10. On January 9, 1964, the UMW filed exceptions to the Regional Director's report and a supplemental brief.

11. On April 28, 1964, the Board issued its Supplemental Decision and Order, overruling the objections to the elec-

tion in their entirety and directing that a hearing be held before a Trial Examiner of the Board to resolve the issues raised by the 421 ballots challenged.

12. On May 11, 1964, Grundy filed a petition for reconsideration and a motion to reopen the record. It requested that the Board set aside its April 28, 1964, decision and affirm the findings and recommendations of the Regional Director in his report on the objections and challenges, or that the Board reopen the original record to receive evidence of occurrences since the hearing which, it alleged, substantially affects the propriety of the unit. Grundy further requested that if the Board denied both its petition and motion, that the Board determine the bargaining agent of its employees independently of all other employees. On May 18, 1964, the UMW filed a response in opposition to Grundy's petition and motion.

13. On June 11, 1964, the Board issued its Order referred to in the opening paragraph of this Report, denying the petition for reconsideration and motion to reopen, including the alternative request, but broadening the scope of the reopened hearing to include not only evidence relating to the challenged ballots but also evidence of events occurring after the election, which may be relevant to changes in the composition of the unit or the continuing existence thereof.

II. The challenged ballots

In seeking to dispose of the issues raised by the 421 challenged ballots, the parties stipulated at the hearing that a majority of the eligible voters as of the date of the election voted for the UMW. They further stipulated that a substantial majority of the 379 voters challenged by the Regional Director voted for the UMW and that a substantial majority of the 42 voters challenged by the UMW voted for the SLU.

On the basis of this stipulation and the tally of ballots, it is clear that UMW would be entitled to certification as the bargaining representative in the multiemployer bargaining unit found appropriate by the Board, unless the record shows that said unit is no longer in existence or that the composition of the unit has so changed as to make it no longer appropriate.

III. Background: composition of the unit

In its Decision and Direction of Election, dated September 20, 1963, the Board found appropriate a multiemployer bargaining unit consisting of production and maintenance employees of employer members of Sewanee. The representation petition filed by the UMW has attached to it a list of 33 mine operators which, it is alleged, were members of Sewanee. A large majority of the operators listed were mining coal on property of Tennessee Consolidated Coal Company (herein called Consolidated), or of Tennessee Products and Chemical Corporation (herein called Products), pursuant to leases or contracts with one of those two companies. The few remaining operators mined coal on the property of other owners or on their own property. Consolidated and Products do not operate any mines themselves.

Following the UMW strike in December 1962, all the mine operator members of Sewanee ceased operating, but Grundy resumed operations in May, 1963. The names of only 12 members of Sewanee appear on the employee voter eligibility list submitted by Sewanee. Sewanee, in its petition to the Board on December 23, 1963, contended that these 12 were the only members of Sewanee who remained, or intended to remain, in business and that some 18 other members of Sewanee were no longer in business Sewanee and Grundy now contend that further changes in the unit found appropriate by the Board have occurred which have destroyed the very existence of that unit.

IV. Contract and agreement of sublease between Products and Collins

At the time of the original hearing in this proceeding, Products owned or had leases covering about half the coal producing lands in the southeast Tennessee area here involved. At the time of the formation of Sewanee, of which Products was a member, Products had subleased its mining properties to or had mining contracts with numerous small mining operators, many of whom were likewise members of Sewanee.

On February 20, 1964, Products entered into a contract and agreement of sublease with Stamper Collins and his wife, who were not members of Sewanee. Under this contract, Products subleased to the Collinses all its coal mining property in the area here involved, subject to the rights, if any, of other operators having subleases or contractual mining rights from Products, and agreed to give notices of cancellation of such subleases or contracts relating to the mining and production of coal, where such contracts or leases could legally be canceled. Subsequent to February 20, 1964, in late April or early May, Stamper Collins entered into a collective bargaining agreement with UMW, covering one or more mines situated on property he had leased from Products. The record does not show what employees were covered by the agreement.

Pursuant to the provisions of its contract with Collins, Products, on April 10, 1964, sent letters to 25 operators who had formerly operated coal mines on Products' property, canceling as of May 10, 1964, the rights of those operators to continue mining on that property. At least 9 of these 25 were members of Sewanee. The cancellation letters concluded with the statement: "If you desire to continue mining operations, we suggest that you contact Mr. Stamper Collins . . . to whom we have subleased our mining properties." None of the recipients of these

cancellation letters, however, has made any agreement with Collins in regard to the resumption or acquisition of coal mining operations.

The nine members of Sewance who received these cancellation letters are listed below:

Basham Coal Company

James M. Campbell, d/b/a Coal Creek Coal Company

Cordell Coal Company, operated by C. C. Cordell

Kelley Creek Coal Company, operated by Jerry A. McGowan

J. H. Graham, d/b/a Ninth West Coal Company

Stephenson Bros. Coal Co., Inc., operated by John Stephenson

Tracy City Coal Company

David Ray Sampson, d/b/a Whitwell Mountain Coal Company, Inc.

O. L. Ellis Coal Company, Inc., operated by O. L. Ellis

Collins, after signing an agreement with UMW, talked to several of these operators, James M. Campbell, Joseph H. Graham, and John Stephenson, about the possibility of operating under what they described as "sweetheart" contract arrangements with the UMW, but all declined to accept any such arrangements. One of the operators, Campbell, is now running a filling station in Tracy City and testified that he never intends to operate a mine again. Another, John Stephenson, bought a farm in April 1963, and testified that he is permanently out of business as a mine operator.

In addition to the operators whose mining contracts were canceled by Products, there are other operators holding subleases from Products which were not subject to cancellation, and others who had no contracts but were mining at the sufferance of Products on its property.

Cates Coal Company was one of those mining on Products' property at its sufferance. Cates has not operated since the strike started and, in view of Products' contract with Collins, it would appear that it has no right to resume mining operations on the property now controlled by Collins.

Easy Coal Company, a corporation operated by Max Condra, has a valid lease from Products and is still in existence as a legal entity. Condra testified, however, that his generator has been destroyed, that his wire has been stolen, that he has tried unsuccessfully thus far to dispose of the property, and that he has no intention of operating the mine again. Since April 12, 1963, Condra has been working as General Mine Foreman for Stamper Collins and, in addition, engaging in the insurance business.

Marshall Meeks Coal Company is owned by Marshall Meeks, Jr. He holds a lease obtained from Products but the latter assigned its interest in the lease to Stamper Collins and so notified Meeks on April 10, 1964. Meeks' mine equipment has been stolen, the mine is filled with water, and rock has fallen into it. Meeks discussed with Collins the possibility of operating the mine again but rejected a proposed plan by which he could operate with Collins under an arrangement with UMW. During the past year, Meeks has been hauling coal for Consolidated or for Grundy. He is now starting up a new mine on Consolidated property and has two employees.

Leon Nunley Coal Company was operated by Leon Nunley. Like Meeks, he held a lease from Products and was informed by Products that it had subleased its mining properties to Collins. Nunley testified that the generator in his mine has been torn up, that equipment has been stolen, and that he is financially unable to resume mining operations. He is now trucking coal for his brother.

Virgil Thomas, d/b/a Virgil Thomas Coal Company, also known as Thomas Coal Company, operated a mine on Whipple Mountain under a lease from Products prior to the strike, and is one of those whose lease was not subject to cancellation. Thomas is now operating a mine on Pilot Mountain between Lake City and Oliver Springs. The old mine is not being operated and a sign near the mine indicates that its equipment is for sale.

V. Mining operations on property controlled by Consolidated

Consolidated controls by lease approximately half the coal mines in the area here involved. It has not directly operated a mine since March 1960, but it is the owner of subsidiary corporations, including Grundy, which are operating companies. Consolidated sells coal mined by these companies.

Grundy has the same president and the same vice president and secretary as its parent corporation, Consolidated. Grundy is the only member of Sewanee which has operated continuously since May 1963. It is by far the largest of the operators.

R & S Coal Company, Inc., was at the time of the strike being operated by Harls McHone and three other stockholders in that company under a lease from Consolidated. The mine being then on retreat, the stockholders closed it down and surrendered the charter of the corporation. McHone, thereafter, on December 16, 1963, organized another corporation, Hemlock Coal Company, of which he is the sole stockholder and has since then been operating a mine formerly operated by Grundy. All the coal he produces is sold to Grundy.

Howard Higgins Coal Company, Inc., was operated by Howard Higgins. In 1962, he was operating a mine under

an oral lease from Consolidated. In September of that year, an explosion shut the mine down. He tried unsuccessfully to get the mine back in operation prior to the strike in December 1962, and later, about November 1963, was informed by a mining inspector that because of gas in the mine, it would be at least 5 years before the mine could be operated again. Higgins testified that he has abandoned the old mine and lease. He now has a hand loading mine which he bought from Grundy and is operating it with the help of some of his former employees. His other former employees, or most of them, are working for Grundy. Higgins formed a new corporation to operate his present mine.

Five other members of Sewanee were at the time of the strike operating coal mines under oral arrangements with Consolidated. They had contracts with Tennessee Valley Authority (herein called TVA) to supply coal, and Consolidated signed their performance bonds. About November 27, 1963, Consolidated wrote these five operators a letter, informing them that TVA officials had indicated that unless deliveries of coal were resumed under the supply contracts, TVA might cancel the contracts and seek damages under the performance bonds. A few days later, after ascertaining that the five operators would be unable to resume operations because of the strike, Consolidated notified them that their oral leases were being canceled. Consolidated then substituted other producers under Grundy to supply the coal to TVA. These five Sewanee members whose leases were thus canceled are listed below.

H. Willis Flynn Coal Company, Inc., was operated by H. Willis Flynn. After his oral lease was canceled, he worked as a foreman for Grundy for a while, then exercised an option given him by Consolidated to operate a new mine. He formed a new corporation, Sycamore Coal Company, and although he had not yet signed a lease for the mining property at the time of the hearing, was in the

process of opening the new mine with the aid of a few employees and using Grundy equipment. The equipment in Flynn's old mine had been burned up.

Goodspring Coal Company, Inc., was operated by Fred Morrison, Sr., its president. He is now dead. Funeral services for him were being held on the last day of the hearing.

Martin Coal Company was operated by Charles Martin. He removed his equipment from his mine when the strike started and it is still intact. Paul B. Callis, president of Consolidated as well as of Grundy, testified that due to Martin's age, he does not intend to lease any of Consolidated's mining property to Martin when the strike is over.

North End Coal Company, Inc., was operated by Harley Bryant. He testified that the mouth of his mine has fallen in and that there is water in it but he believes that it can be cleaned up and operated again. He testified that he would like to resume mining operations when the strike is settled. Consolidated's President Callis testified that he would be glad to try to negotiate a lease with Bryant when the strike is settled.

J. W. Sanders Coal Company, Inc., was operated by John W. Sanders. He testified that although he has no arrangements whereby he may resume coal mining after the strike, it is his intention to do so if he can. Consolidated's President Callis testified, however, that due to Sanders' age, he does not intend to permit Sanders to resume operations on Consolidated's property.

VI. Members of Sewanee who were independent mine operators

Hubert Fults, d/b/a Hubert Fults Coal Company, was operating under a lease from Earl Patton, who owned the mining property, in the fall or winter of 1962. Fults surrendered the lease to Patton who then operated the mine

for about 6 weeks. Earl Patton's name does not appear on the list of Sewanee members attached to the representation petition, but it was agreed at the hearing that Earl Patton, as well as Hubert Fults, had applied for membership and were considered members. During the strike Patton has been operating a small mine at Graysville in Bledsoe County. He testified that he would like to open the mine he took back from Fults if the strike is settled satisfactorily and if he is financially able to start it again.

C. P. Hunziker, d/b/a C. P. Hunziker Coal Company, was operating a mine on Hunziker's own property prior to the strike. He testified that he is 69 years old, too old to start mining again, and that his mine is for sale. For the past 3 years he has been operating a motel which he bought just before the strike began. He had started operating it while still mining.

Frank Hunziker Coal Company was operated by Frank Hunziker, a brother of C. P. Hunziker, prior to the strike. The latter testified that the mine operated by his brother has not been in operation since the strike.

Leon Patton, d/b/a Leon Patton Coal Company, owns a mine which, prior to the strike, was operated by his father, James Patton. Leon Patton has purchased a home in Chattanooga where he has been working for DuPont for about 1½ years. His mine equipment has been pulled from the mine and is for sale. James Patton testified that he has no intention of going back into the coal mining business and is presently cutting timber on land which he owns.

J. R. Patton Coal Company was operated by J. R. Patton. According to his brother, James Patton, he is now working as a coal loader for Willis Flynn.

M. A. Payne, Inc., was shown in the prior hearing to be an independent operator, but no evidence was adduced at this hearing regarding it.

VII. Sewanee: surrender of its corporate charter

When the employers, in September 1962, decided to bargain on a multiemployer basis and formed Sewanee, they incorporated it. On June 8, 1964, the Board of Directors of Sewanee met and adopted a resolution calling for the surrender of the charter of the corporation and for its dissolution. Pursuant to the resolution, Sewanee's charter was surrendered to the State of Tennessee on June 10, 1964.

The resolution for dissolution of the corporation and surrender of its charter insofar as it purports to relate to the purpose of such action, is set forth below:

> WHEREAS, heretofore when Sewanee Coal Operators Association, Inc., formed in September, 1962, it expressed in its purpose an idea of self-help and negotiations covering full properties owned by Tennessee Products & Chemical Corp. and Tennessee Consolidated Coal Co., with the operators being brought together for self-help; and
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> WHEREAS, during the early months of its existence the operators on both sides of the mountain did cooperate fully and both big companies did cooperate with said Association and became members; and
>
> WHEREAS, its matters with regard to strike with United Mine Workers of America became worse and the parties attempted to negotiate and the entire coal fields were shut down by strike in December, 1962; and
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> WHEREAS, in February of 1964 Tennessee Products & Chemical Corporation leased their entire leaseholdings to one Stamper Collins and wife, Susie Collins of Oak Ridge, Tennessee; and
>
> WHEREAS, Tennessee Products & Chemical Corporation exercised certain rights allegedly reserved

in their leases, cancelled all leases of the operators who were members of this Association, with the exception of some very few; and

WHEREAS, properties operated heretofore by Tennessee Products & Chemical Corporation were no longer within the leasehold and operations of this Association; and

WHEREAS, there remains only four (4) companies of said Association who have not received cancellation, being Thomas Coal Co., Leon Nunley Coal Co., Marshall Meeks Coal Co., and Easy Coal Co., all others having been cancelled; and it further appearing that the entire purpose of said Association had been voided;

VIII. Conclusions and recommendations

It is clear that most of the many changes reflected by the record in the status of the mine operators who formed Sewanee in September 1962, have resulted either directly or indirectly from the long and bitter strike which commenced on December 26, 1962, and is still in progress. Even the contract and agreement of sublease between Products and the Collinses, which appears to have played such a strong role in the decision of Sewanee to dissolve and surrender its corporate charter, may well have been a result of the strike and the inability of Products to furnish coal to TVA, as it had committed itself to do. This contract, as stated on its face, was intended to create a relationship in the nature of the legal status of landlord and tenant, with Products as the landlord and the Collinses as tenants. Although the contract is for a duration period of about 8 years, it has a forfeiture provision which could well result in an early reversion of the subleases to Products. Products remains in existence and is still responsible under the lease agreements to the own-

ers of the property from which it acquired its leases, and to several of the Sewanee members to whom it subleased mining property, namely, Easy Coal Company, Marshall Meeks Coal Company, Leon Nunley Coal Company, and Virgil Thomas Coal Company.

Products was an important member of Sewanee, not because of the number of its employees in the bargaining unit—for it had only three—but because it had mining contracts or leases with so many of the other Sewanee members. It cannot be assumed, however, that Products' lessee, Stamper Collins, will be any less anxious than was Products to make arrangements with operators to produce coal. Collins demonstrated his concern on this score in seeking to arrange with James M. Campbell, who operated Coal Creek Coal Company, with Marshall Meeks, with Joseph H. Graham, who operated Ninth West Coal Company, and with John Stephenson, to resume mining operations. Products appears to have contemplated that those mine operators who had been producing coal for it before the strike might wish to continue doing so for Collins, for in the cancellation letters sent 25 of the operators on April 10, 1964, Products suggested that if they desired to continue mining operations, they should contact Stamper Collins.

Grundy argues that the signing by UMW of a separate collective bargaining contract with Stamper Collins has operated to destroy the multiemployer bargaining unit. However, since Collins had never joined Sewanee and never became a part of the multiemployer bargaining unit, Grundy's contention in this respect must be rejected.

Nor does the fact that Sewanee surrendered its corporate charter and dissolved itself as a corporation destroy or render inappropriate the multiemployer bargaining unit. It is of little consequence whether the employers be

organized in corporate form or, indeed, whether they have any formal organization at all.[1] More important is the fact found by the Board that coal mining operators in the area here involved had a history of successful bargaining on a multiemployer basis, and that they expressed the desire to continue bargaining on such multiemployer basis, as evidenced by their formation of an association for that purpose, and their meetings with UMW before the strike for the purpose of attempting to reach a bargaining contract.

It is obvious from the record that most of the small operators in the area here involved have little or no bargaining strength as individuals and must follow the lead of a large operator such as Grundy, or else band together as they sought to do under Sewanee and, in conjunction with Grundy, assert their collective strength in bargaining. The fact that many of them—because of heavy financial losses suffered during the strike, or because the mines which they had been operating are no longer operable—expressed the view that they will not be financially able to resume their business as operators if and when the strike is settled, does not, in my view, warrant a finding that the multiemployer unit no longer exists or is inappropriate. Many of these opertors have operated coal mines for years or for most of their lives, and have obtained financial assistance before in starting and continuing to operate mines. Consolidated signed the performance bonds of a number of those operators producing coal for TVA. Grundy only recently has permitted one of the operators, Flynn, to use some of its equipment in getting a new mine started. In the past, small operators on property controlled by Products have formed partnerships and obtained supply contracts with TVA, with Products signing as surety on their performance bonds. Products assisted some of them

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[1] *Belleville Employing Printers,* 122 NLRB 350, 353.

financially in other respects. Accordingly, despite the testimony of some of the operators that they have no present intention of resuming the business of operating coal mines, I am convinced that some of those so testifying will find the means of again operating their old mines or other mines in that area, and that they will continue to feel the need of collective strength in bargaining with the representative of their employees as they did when they joined Sewanee.

The record shows that several of the small operators who have been found by the Board to constitute a part of the multiemployer bargaining unit operated under corporate names but are now operating as individuals or under different corporate names. Where an individual had the sole or controlling interest in a corporation which was a member of Sewanee, it seems only fair and realistic, for purposes of this proceeding, to consider him rather than the corporation as the person constituting a part of the multiemployer group. Accordingly, where the individual forms another corporation and operates a new or different mine in the geographic area here involved, his employees should be treated as continuing to constitute a part of the multiemployer bargaining unit. By the same token, it should not be considered material for the purposes of this proceeding that a member of Sewanee is now operating, or will when the strike ends be operating, a mine in the same geographic area, different from the one he operated prior to the strike.

In view of the constantly shifting status of the small mine operators who were members of Sewanee, and the continuing uncertainty as to what the status of each will be when and if the strike is settled, I see no useful purpose in attempting at this stage to identify those who at the date of the reopened hearing may have appeared to be in business and those who may have appeared to be out of business as coal mining operators. It is sufficient, as the

record shows, that a number of them in addition to Grundy are now engaged in operating coal mines, and that others have expressed an intention or desire to resume operating their old mines or to start operating new ones when and if they can.

It may well be that a substantial number of those operators who were members of Sewanee before the strike started will never again operate coal mines in the area here involved. But even a substantial diminution in the membership of a multiemployer unit does not destroy that unit or render it inappropriate.[2]

Employers, of course, may effectively withdraw from multiemployer units at appropriate times. But plainly a withdrawal after bargaining negotiations have commenced, a strike has ensued, and the union has won an election in the multiemployer unit is not an appropriate time.[3]

The multiemployer bargaining unit heretofore found by the Board to be appropriate was described in the Decision and Direction of Election as comprising the production and maintenance employees of all members of Sewanee, but in view of the fact that Sewanee in its corporate form has dissolved since the UMW won the election, the multiemployer unit is now more accurately described as comprising the production and maintenance employees of those coal mining operators who were formerly members of Sewanee. It is accordingly recommended that the Board certify the UMW as the collective bargaining representative of all the production and maintenance employees of coal mining operators who were formerly members of

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[2] See *Puerto Rico Steamship Association*, 116 NLRB 418, in which the number of employers in the unit had diminished from 12 to 4, and *International Restaurant Associates*, 133 NLRB 1088, in which the number had diminished from 10 to 2.

[3] *Retail Associates, Inc.*, 120 NLRB 388; *Dittler Bros, Inc.*, 132 NLRB 444; *Fairbanks Dairy*, 146 NLRB No. 111.

Sewanee, including those who are not now operating but who resume the business of operating coal mines at the end of the strike or before the conclusion of the strike.

Dated at Washington, D. C. September 29, 1964.

/s/ Fannie M. Boyls
Fannie M. Boyls
Trial Examiner

United States of America

Before the
National Labor Relations Board

Sewanee Coal Operators' Association, Inc.
Employer

and Case No. 10-RC-5497

United Mine Workers of America
Petitioner

Grundy Mining Company
Employer

and Case No. 10-RC-5593

Local No. 139, Southern Labor Union
Petitioner

M. A. Payne, Inc.
Employer

and Case No. 10-RC-5604

Local No. 139, Southern Labor Union
Petitioner

Stephenson Bros. Coal Co., Inc.
Employer

and Case No. 10-RC-5605

Local No. 139, Southern Labor Union
Petitioner

Decision and Direction

Pursuant to the Board's Supplemental Decision and Order dated April 28, 1964,[1] and Order dated June 11, 1964,[2] Trial Examiner Fannie Boyls issued her Report on Challenged Ballots and Events Affecting Composition of Unit, recommending that the Board certify the United Mine Workers of America as the collective-bargaining representative of all production and maintenance employees of coal mining operators who were formerly members of Sewanee Coal Operators Association, including those not now operating but who resume operating old mines either before or after the conclusion of the strike, and including also those individuals who had sole or controlling interest in a corporation which was a member of Sewanee Coal Operators Association who form another corporation and operate a new or different mine in the geographic area here involved. Thereafter, Grundy Mining Company and Southern Labor Union filed exceptions to the Report and supporting briefs. The Petitioner filed a brief in support of the Trial Examiner's Report.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Report, the exceptions, briefs,

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[1] 146 NLRB No. 140. On October 10, 1963, an election was held among the employees of Sewanee Coal Operators Association. At the conclusion of the election, a tally of ballots showed that 108 votes were cast for the Petitioner, 50 for the Southern Labor Union, and 421 ballots were challenged. The Board's decision directed that a hearing be held to resolve the issue raised by the challenged ballots.

[2] In this Order, the Board broadened its order to permit the introduction of evidence of events since the election which might affect the propriety of the unit.

and the entire record in this case, and hereby adopts the findings,[3] conclusions, and recommendations of the Trial Examiner except as modified herein.[4]

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for the Tenth Region shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this direction, open and count the ballots of the challenged employees, and prepare and cause to be served upon the parties a revised tally of ballots, and an appropriate certificate.

Dated, Washington, D. C., May 17, 1965.

Frank W. McCullough, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

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[3] On page 3 of the Report the Trial Examiner misstates the stipulation of the parties. It is hereby corrected to read "That of all the eligible voters *who voted in the election a majority of those who actually voted* voted for the United Mine Workers."

[4] We interpret the stipulation of the parties as in effect withdrawing the challenges to the ballots. In the absence of exceptions and on the basis of the entire record herein, we find that all employees whose ballots were challenged are eligible to vote, and in the circumstances of this case, we believe that it would best effectuate the purposes of the Act if these ballots are now opened and counted before issuing any certificate. Accordingly, we direct that the Regional Director open and count the challenged ballots, and prepare and serve upon the parties a revised tally of ballots and the appropriate certificate.

PREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 2 1970
E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1970

No. [redacted] 219

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
BASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS d/b/a CHERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, Formerly CLEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL COMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMPANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODSPRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS and/or AUSTIN MATTHEWS d/b/a HICKORY COAL COMPANY, HOWARD HIGGINS COAL COMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL COMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, ALTON JOHNSON d/b/a MAPLE COAL COMPANY, MARTIN COAL COMPANY, MARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END COAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON d/b/a HUBERT FULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL COMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN d/b/a POPLAR COAL COMPANY, JOSEPH H. GRAHAM d/b/a PINE COAL COMPANY, R & S COAL COMPANY, J. W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., ALTON JOHNSON d/b/a SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, TENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL THOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY and NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF

In Opposition to the Petition for Writ of Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1650

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

UNITED MINE WORKERS OF AMERICA,
Petitioner,
v.
BASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS d/b/a CHERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, Formerly CLEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL COMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMPANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODSPRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS and/or AUSTIN MATTHEWS d/b/a HICKORY COAL COMPANY, HOWARD HIGGINS COAL COMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL COMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, ALTON JOHNSON d/b/a MAPLE COAL COMPANY, MARTIN COAL COMPANY, MARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END COAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON d/b/a HUBERT FULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL COMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN d/b/a POPLAR COAL COMPANY, JOSEPH H. GRAHAM d/b/a PINE COAL COMPANY, R & S COAL COMPANY, J. W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., ALTON JOHNSON d/b/a SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, TENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL THOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY and NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF

For all Respondents except Cardell Coal Company, Tennessee Products Company and the National Labor Relations Board in opposition to Petition of the United Mine Workers of America for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable, The Chief Justice and the Associate Justices of The Supreme Court of the United States:

This brief is filed on behalf of all respondents herein except Cardell Coal Company, Tennessee Products Company and the National Labor Relations Board (hereafter referred to as respondents) in opposition to the Petition for Writ of Certiorari filed in this cause by the United Mine Workers of America, said Petition having been filed to review the judgment of the United States Court of Appeals for the Sixth Circuit entered March 5, 1970 in National Labor Relations Board vs. Basham Coal Company, et al, No. 18463 wherein the Sixth Circuit denied enforcement to a bargaining order of the National Labor Relations Board.

OPINION BELOW

The opinion of the Sixth Circuit is officially reported at 423 F.2d (1970) and is reprinted in its entirety in Appendix A of petitioner's brief. The opinion and order of the National Labor Relations Board, hereinafter referred to as the Board, is officially reported at 167 NLRB 12 and is reprinted in Appendix B of petitioner's brief. The Report of the National Labor Relations Board Investigation by the Regional Director is reprinted in Appendix A of respondents' brief.

QUESTIONS PRESENTED

Respondents do not accept the questions proposed by the United Mine Workers

and propose instead the following questions:

1. Did the Sixth Circuit err in holding that under unusual circumstances employers could withdraw from a multi-employer bargaining unit without the consent of the Union?

2. Did the Sixth Circuit err when it held that where the National Labor Relations Board had enunciated a per se rule as to withdrawal of employers from a multi-employer bargaining unit after the start of negotiations, the Board exceeded its statutory authority and its decision based upon such a rule was so arbitrary as to require the Appellate Court to apply the proper legal standard?

3. Did the Sixth Circuit properly find that the alleged violations of Section 8(a) 1 and 2 of the Act were barred by the six months statute of limitations of Section 10(b) of the National Labor Relations Act?

STATUTE INVOLVED

The statute here under consideration is the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.)

STATEMENT OF FACTS

BACKGROUND

This case arises out of the labor strife and economic conditions which have beset southeast Tennessee coal fields since 1960. The locus of the dispute is the Tennessee

counties of Grundy, Marion and Sequatchie.

From about 1950 to 1958, Products and Tennessee Consolidated Coal Company (hereinafter referred to as Consolidated) recognized and bargained with the UMW as the representative of their employees engaged in the mining of coal in the Southeast Tennessee area. Prior to February 1963, Consolidated and Products were the dominant interests in this area, both firms having actively operated coal mines in their own behalf and/or having leased portions of coal fields which they controlled to various independent operator-lessees and sub-lessees (J.A.15a)[1] However, by February of 1963, neither Consolidated nor Products had any employees in the area and both had completely terminated all mining operations except those which may be imputed to Consolidated through the activities of its subsidiary Grundy Mining

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[1] "J.A." references are to portions of the record printed in the Joint Appendix used in the Sixth Circuit. References to the transcript of testimony in all proceedings are designated as "Tr". Reference to the first representation proceeding would be indicated by "RI". Reference to the second representation proceedings are indicated by "RII" and unfair labor practice proceeding are "RIII". Reference to the exhibits in such proceedings are designated as follows: General Counsel's Exhibits - "GCX"; Tennessee Products Exhibits - "PX"; Sewanee's Exhibits - "SX".

Company (hereafter referred to as Grundy) and have not resumed operations since (J.A. 37a).

On March 15, 1960, Consolidated terminated its contract with the United Mine Workers and closed down its Coal Valley Mine (RI. Tr. 1-10). In May of 1961, Consolidated entered into a contract with Allen and Garcia, a coal mine management organization, to reopen the Coal Valley Mine (RI.Tr. 1-12). When Allen and Garcia took over the operation of the Coal Valley Mine, they entered into a contract with the UMW covering this mine (RI. Tr. 1-14). In June of 1962, the Coal Valley Mine was closed and the mine known as Gray's Creek No. 11 mine was started (RI. Tr. 1-17). In August, 1962, Allen and Garcia gave the UMW sixty days notice of termination of its contract with them. The termination date was October 24, 1962. On October 10, 1962, Allen and Garcia ceased operation of the mines, and Grundy Mining Company took over as operator (RI. Tr. 118, 121-1221). Products ceased all mining operations in its own behalf on January 31, 1962, completed all recovery work on its mines by February 28, 1962, and officially closed its mines as of March 1, 1962. By February of 1963, Products had terminated its three remaining tipple employees due to its inability to purchase coal and meet certain contract obligations (RI. Tr. page 88, line 7).

Since the record is completely barren of any operations by Consolidated after the termination of its operations through Allen and Garcia on October 10, 1962, and

since Products had ceased all mining operations and had terminated all employees as of February, 1963, it is clear that neither Consolidated nor Products engaged in coal mining operations since February of 1963.

From about 1950 to August of 1958, Products, Consolidated, and Whitwell Coal Company (hereinafter referred to as Whitwell) had engaged in multi-employer bargaining with UMW through an organization known as the Southern Tennessee Coal Producers Association which was composed of Products, Consolidated, and Whitwell. A series of contracts were negotiated, the last of which was executed in 1958 and terminated in 1962. The practice during this period was that after a contract had been negotiated between Southern Tennessee Coal Producers Association and the UMW, the small operators in the area would sign a separate contract with the UMW (RI. Tr. 136). This contract was a printed contract, identical to that negotiated between the Southern Tennessee Coal Producers Association and the UMW. By the Fall of 1962, the only contract in effect between the UMW and any operators in the area was that between the UMW and Allen and Garcia covering Coal Valley Mine which, as has been previously seen, was closed at that time (RI. Tr. 114).

In September of 1962, the UMW filed a petition for an election among the employees of the Gray's Creek No. 11 Mine in Palmer, Tennessee, naming Allen and Garcia employer (RI. Tr. 118-119). This petition was amended on or about October 15, 1962, naming Grundy Mining Company as the em-

ployer at the Gray's Creek No. 11 Mine (RI. Tr. 122). This petition was an entirely separate transaction from any negotiations which occurred between the UMW and Sewanee Coal Operators Association (hereafter referred to as Sewanee).

Sewanee was formed on October 2, 1962. The first bargaining session between Sewanee and the UMW was held in the Fall of 1962. At the first session, the UMW was advised that Grundy, Consolidated, and Products were not members of Sewanee for bargaining purposes and that they would not be bound by any contracts negotiated between Sewanee and the UMW until there had been an election among their employees and a certification of the UMW as the bargaining representative of their employees (RI. Tr. 138 et seq.; p. 219-220).

Between October, 1962 and January, 1963 there was a series of four meetings between the UMW and Sewanee at which attempts were made to negotiate a new collective bargaining agreement covering the southeast Tennessee coal fields (J.A. 16a). The respondents were and are presently unable to meet the terms of the National Bituminous Coal Wage Agreement of 1950 as amended (hereafter referred to as N.B.C.W.A.) offered by the UMW which were, effectually, the only terms to which the UMW would agree (Ramsey v. UMWA., 265 F. Supp. 388, 430). The N.B.C.W.A. had previously been negotiated between the UMW and the Bituminous Coal Operators of America (hereafter referred to as B.C.O.A.).

The negotiations between Sewanee and the UMW broke down on December 26, 1962, and the UMW called a strike throughout the coal fields resulting in the closing down of all operations in the area. This strike has continued (RIII. Tr. 67). On February 23, 1963, the United Mine Workers filed the first of a series of representation petitions which culminated in the unfair labor practice case presently under consideration (J.A. 34a).

Since 1960, these coal fields have been the scene of continued violence, threats, and intimidation perpetrated by the representatives of the UMW against the non-union employees. See Gibbs v. United Mine Workers of America, 343 F. 2d 609 (C.A. 6), 612 through 614. In Local 5881, United Mine Workers of America and Grundy Mining Company, Case No. 10-CB-1225, the Local was ordered to cease and desist from the use of violence against Grundy employees, which order was enforced by the Sixth Circuit in the case of NLRB v. Local 5881, United Mine Workers of America, 296 F. 2d 734 (C.A. 6, 1961). On the day after the December 26, 1962 strike was called, further violence by the UMW resulted in a citation of Local 5881 for contempt of Court in NLRB v. Local 5881, United Mine Workers of America, No. 1468, in the United States Court of Appeals for the Sixth Circuit. As a result of the contempt citation, the Honorable Leslie Darr, United States District Judge for the Eastern District of Tennessee, Southern Division, sitting as special master, recommended fines to Waldon Shrum, President of Local 5881

James Fults, Vice President of Local 5881, and against Local 5881, UMW. The findings of Judge Darr, sitting as special master, were affirmed in NLRB v. Local 5881, United Mine Workers of America, 323 F. 2d 853 (1963, C.A. 6). Additionally, a cease and desist order was recommended by the trial examiner in July 1963 against Local 7083 and District 19 of the UMW because of the UMW's violence. The trial examiner's findings were adopted by the Board at 146 NLRB 20. In May of 1963, Local 7083 of the UMW engaged in further violence against employees of Grundy Mining Company. Local 7244 of the UMW attempted, by violence, to prevent the Grundy employees from organizing and electing officers of a Local of the Southern Labor Union. The UMW was again found guilty of violating the National Labor Relations Act as reported in 146 NLRB 29 (see Appendix A of respondents' brief, P. 7b-8b).

On September 20, 1963, the Board issued a decision and direction of election (J.A. 14a) directing the election to be held for the multi-employer unit composed of all persons and firms who were members of, or associated with, Sewanee including Products, Consolidated and Grundy. The election was held on October 15, 1963 (J.A. 22a, 24a; RII. GCX 1-A). At the time of the election only 12 of the original 41 members or associates of Sewanee were either engaging in business or had any intention to remain in business (J.A. 24a; RII. GCX 1-A). All ballots of employees of the other members of Sewanee who had ceased operations were

challenged. The Board ordered a hearing to resolve the issues raised by the challenged ballots (J.A. 24a, 69a; RII. GCX 1-A) and broadened the scope of the hearing to include questions of the continued existence of the unit. Prior to said hearing, on June 8, 1954, Sewanee dissolved itself and surrendered its corporate charter, and all formal and informal activities of the association ceased as of that date (RII. Tr. 116).

After hearings, the trial examiner recommended that the Board certify the UMW as the representative of all production and maintenance employees of coal mining operators who were formerly members of Sewanee, including those who are not presently operating but who should resume the business of operating the coal mines at the end of the strike or before the conclusion of the strike (J.A. 51a). The trial examiner also concluded that Grundy and Consolidated were members of the association and would be bound by such certification.

On May 17, 1965, the Board issued a decision (J.A. 53a) adopting the findings, conclusions and recommendations of the trial examiner. On June 7, 1965, the Regional Director for the Tenth Region issued a formal certification of the UMW (J.A.55a).

THE ALLEGED UNFAIR LABOR PRACTICE

On June 17, 1965, the UMW sent a copy of a form letter to all respondents including Products and Cardell Coal Company addressed to William A. Ables, Esq., as counsel and secretary of Sewanee requesting a meeting

for the alleged purpose of entering into the negotiation of a collective bargaining agreement between Sewanee and the UMW. Subsequently, on July 19, 1965, the UMW sent a second form letter again requesting a meeting. On November 1, 1965, the UMW filed unfair labor practice charges alleging a refusal to bargain. These charges were not served on all of the alleged members of Sewanee. An amended charge was filed on March 22, 1966 and served on March 28, 1966 upon all respondents including Products and Cardell Coal Company (J.A. 76a, 77a).

Concerning the charges relating to the Southern Labor Union contract, it is undisputed that H. Willis Flynn was the sole operator of Willis Flynn Coal Company, a member of Sewanee (J.A. 96a). In December, 1963, Flynn incorporated the Sycamore Coal Company. Thereafter, Sycamore, under the name and style Poplar, began to operate and mine an area involved in this matter (J.A. 96a). On or about July 16, 1964, Sycamore, under the style of Poplar, recognized and executed a contract covering its employees at this mine with the Southern Labor Union (J.A. 96a). The charges were filed against Sycamore in July of 1965 and served on July 9, 1965, almost a full year from the date of the signing of the contract between Sycamore and the Southern Labor Union (J.A. 96a).

THE ANTI-TRUST SUITS

While they do not bear directly on the limited questions before the Court in considering petitioner's request for the issuance of a Writ of Certiorari, the anti-

trust suits filed by certain of the respondents against petitioner are part and parcel of the long history of strife and conflict in southeast Tennessee. The case bearing most directly on matters here under consideration is Tennessee Consolidated Coal Company v. United Mine Workers of America, 416 F. 2d 1192, a 1969 decision of the Sixth Circuit, certiorari denied by this Court on March 1, 1970, docket number 1163, October Term, 1969, affirming a 1967 decision from the Eastern District of Tennessee, Southern Division, awarding damages in the amount of 1.8 million dollars for anti-trust violations by the UMW against the plaintiffs. Briefly, the defendants were found guilty of violating Sections 1 and 2 of the Sherman Act by requiring all coal companies whose employees it represented to sign the NBCWA, a contract previously negotiated by the UMW and the BCOA, the BCOA being the other party to the conspiracy

THE SIXTH CIRCUIT'S OPINION

On March 5, 1970, the United States Court of Appeals for the Sixth Circuit rendered a decision denying enforcement of the Board's order. The Court held in part:

> We are persuaded that the events before and after the election of October 15, 1963, destroyed the consen(s)uality needed to justify the creation and, in all events, the continuation of a multi-employer unit. The abortive effort of the Sewanee Association to come to agreement with UMW before the commencement of the strike, called by the latter, did not

foreclose withdrawal, from whatever multi-employer unit may have once existed under the unusual circumstances here present. (Emphasis supplied)

We are also of the view that in all events by the time the certification of the UMW as the exclusive bargaining agent of Tennessee Products and the other respondents was made on June 7, 1965, there was not in existence a legitimate identifiable multi-employer unit which could be required to bargain with the UMW...

The charge of violation of Section 8(a) (1) and (2) was not made until July 1, 1965 almost a year after the accused contract or contracts of July 16, 1964. If there was a violation, that is the date it occurred... We therefore hold that the finding of a violation of Section 8 (a) (1) (2) by Sycamore-Poplar was invalid. Tennessee Products and Chemical Corporation, et al v. NLRB 423 F 2d 169, 179-180

REASONS FOR DENIAL OF THE PETITION

I.

THE SIXTH CIRCUIT DID NOT ERR IN HOLDING THAT UNDER UNUSUAL CIRCUMSTANCES EMPLOYERS COULD WITHDRAW FROM A MULTI-EMPLOYER BARGAINING UNIT WITHOUT THE CONSENT OF THE UNION.

At the outset, it would be instructive to consider a brief history of the evolution of the unusual circumstances rule relied upon upon by the Sixth Circuit in its decision in this case.

The source of the rule apparently is a 1958 Board decision, Retail Associates, Inc., 120 NLRB 388. In that opinion, the Board held at page 395:

> Where actual bargaining negotiations based on the existing multi-employer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances. (Emphasis supplied).

The next major decision in the development of this rule and the one upon which the UMW relies in its petition for certiorari is NLRB v. Sheridan Creations, Inc., 357 F. 2d 245 (1966), a Second Circuit opinion written by Justice Smith, concurred in by District Judge Levet and dissented in by Chief Justice Lumbard. In that case, the Court stated the rule as follows:

> Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever. Since this is the purpose of the rule, it is used as an alternative to an inquiry into good faith. Ibid; Page 248.

The Court in Sheridan held that despite the apparent good faith of the employer, withdrawal after bargaining had begun was improper.

Next comes a 1966 opinion of the Sixth Circuit, Universal Insulation Corp. v. NLRB, 361 F. 2d 406. In that case the employer was held to be bound by a contract

which was negotiated by the remaining members of a multi-employer bargaining unit after that employer had withdrawn from the unit. The employer had threatened withdrawal if a new contract had a wage increase in it. The Court in that case relied upon the Sheridan opinion.

Also decided in 1966 was Tenth Circuit case, NLRB v. Tulsa Sheet Metal Works, Inc., 367 F 2d 55. The Tenth Circuit there stated the rule to be:

> Although participation in multi-employer bargaining is voluntary, the Board has repeatedly held that withdrawal therefrom can be accomplished only at an appropriate time and that in the absence of union consent or unusual circumstances, withdrawal is untimely if attempted after the commencement of negotiations. (Citing cases including Sheridan). (Emphasis supplied) Ibid; Page 57.

In Tulsa Sheet Metal, the Court infers that an absolute impasse in bargaining could be such unusual circumstances as contemplated by the rule:

> Respondent asserts that its withdrawal was rendered permissible due to existing special circumstances. It is contended that the withdrawal was justified by the existence of an impasse in bargaining. This contention, however, finds no support in the record, for while substantial disagreement existed on May 31 (respondent withdrew June 3) the parties neverthe-

less contemplated and arranged for additional bargaining sessions after the expiration of the existing contract, and these meetings ultimately produced an agreement. (Interim agreements were made with the remaining members of the unit and ultimately, on June 21, a new contract was negotiated). This indicates an expectation that negotiations would continue to a successful conclusion, and it is apparent that there was no impasse. Ibid; Page 58.

The clear implication from the foregoing is that had the Court found that there was an impasse in the negotiations, the employers contention that withdrawal was permissible because of the special circumstances would have been valid.

The next case is NLRB v. Spun-Jee Corporation, 385 F. 2d 379, a 1967 decision of the Second Circuit written by Justice Smith and concurred in by Chief Justice Lumbard and Justice Waterman. In that case the Court reviewed the development of the rule with regard to withdrawal from a multi-employer bargaining unit:

The Board in Sheridan, 148 NLRB 1503, relied on Kroger, 148 NLRB 569. The rule (no withdrawal from multi-employer unit once bargaining negotiations have begun) is said, however, to have originated in Retail Associates, where the rule is stated with an additional caveat ("absent unusual circumstances"). The Tenth Cir-

cuit in Tulsa Sheet Metal Works, supra, while citing Sheridan, also inserts this cautionary phrase although no such circumstances were there found. Since neither in Sheridan nor Kroger were there facts which required consideration under such a vaveat, its omission is not necessarily significant of its abandonment. In the case at bar there are the circumstances that the attempted withdrawal followed upon the employer's decision for legitimate economic reasons to close down one complete division of his business and contract out that work. Spun-Jee, Op. cit. Page 382. (Emphasis supplied)

The Court went on to remand the case to the Board to consider whethere there were unusual circumstances such as to permit withdrawal. Thus, the Second Circuit which wrote the Sheridan opinion which is the source of the per se rule relied upon by the Board in the present case made clear that it did not intend to enunciate a per se rule in the Sheridan case and held only that under the facts of that case, withdrawal was not proper.

Finally, we come to the present case, reported at 423 F. 2d 169 (1970). The Sixth

Circuit held that the Board's reliance upon a per se rule[2] was improper and that the unusual circumstances and:

> ...events before and after the election of October 15, 1963, destroyed the consen(s)-uality needed to justify the creation and, in all events, the continuation of a multi-employer unit... (and) that in all events by the time the certification of the UMW as the exclusive bargaining agent of Tennessee Products and the other respondents was made on June 7, 1965, there was not in existence a legitimately identifiable multi-employer unit which could be required to bargain with the UMW. 423 F.2d 169, 179.

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[2]"The question then is whether these respondents may avoid that obligation by their unilateral act in dissolving Sewanee after the commencement of collective bargaining. It is plain that they may not... the rule and reason for it have been quite recently explicated by the Court of Appeals for the Second Circuit in NLRB v. Sheridan Creations, Inc., 357 F. 2d 245 (1966) where the Court stated at pp. 247-248: '...(T)he potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun.'" See Decision of the Trial Examiner as reported in Appendix B, Petitioner's Brief, pp. A-64-65.

In short, the Sixth Circuit held in the present case that the Board applied an improper legal standard by applying a per se rule in reaching its determination that an employer may not withdraw from a multi-employer bargaining unit once negotiations have begun, rather than applying the proper rule - that such withdrawal may be appropriate under unusual circumstances. The Board apparently recognized its error here and did not seek a Writ of Certiorari.

II

THE SIXTH CIRCUIT DID NOT ERR WHEN IT HELD THAT WHERE THE NATIONAL LABOR RELATIONS BOARD HAD ENUNCIATED A PER SE RULE AS TO WITHDRAWAL OF EMPLOYERS FROM A MULTI-EMPLOYER BARGAINING UNIT AFTER THE START OF NEGOTIATIONS, THE BOARD EXCEEDED ITS STATUTORY AUTHORITY AND ITS DECISION BASED UPON SUCH A RULE SO ARBITRARY AS TO REQUIRE THE APPELLATE COURT TO APPLY THE PROPER LEGAL STANDARD.

The UMW has taken the position that the Sixth Circuit exceeded the limits of judicial review by considering the merits of the appropriateness of the multi-employer unit created by the Board. However, this analysis fails to consider that the Board applied a totally improper standard in arriving at its decision.

As has been seen in Section 1, the Board took the position that once negotiations had begun, under no circumstances could withdrawal be permitted. The Board relied

upon the Sheridan case and the logic of that opinion that:

> ...To permit withdrawal after negotiations commence might well lead to a breakdown of the unit. Withdrawal should be restricted to the period before negotiations to assure that it is not used as a bargaining lever. Sheridan, Page 247-248, 357 F. 2d

The purpose of the NLRB is to "effectuate the policies of the (National Labor Relations) Act." 473 F. 2d 175. Clearly, one of the primary means of achieving this objective is the encouraging of the collective bargaining process. However, the per se rule relied upon by the Board and urged here by the UMW does not satisfy this underlying philosophy of the National Labor Relations Act. Under certain unusual circumstances, such as those found in the present case by the Sixth Circuit, the per se rule not only fails to encourage negotiations, but acts in the opposite direction and forces a stalemate. The Sixth Circuit reviewed at great length the long history of labor strife in the southeast Tennessee coal fields. Based upon this history, the Court determined, rightfully so, that the continued existence of an artificial unit as required by the Board, rather than effectuating the policies of the Act, inhibited these policies. The present case clearly represents just those sort of circumstances envisioned by the Tenth Circuit in Tulsa Sheet Metal Works where negotiations had completely broken down and continued bargaining on a multi-employer basis would

serve no purpose other than to prolong the impasse and force further polarization.

This is not a case in which the Sixth Circuit has substituted its own judgment for the factual findings of the Board. Rather, it is a recognition by the Court that the unreasonableness and arbitrariness exhibited by the Board in applying a per se rule despite the unusual circumstances outlined at length in the Court's opinion[3] constituted a failure on the part of the Board to effectuate the policies of the National Labor Relations Act. The Board itself clearly recognized that its objective is to effectuate the policies of the Act as shown by the order of the Trial Examiner recited in part by the Sixth Circuit at Page 175 of its opinion. The Board recognized its error in applying the per se rule to the circumstances here present, accepted the decision of the Sixth Circuit, and did not seek certiorari.

Parenthetically, an additional element considered by the Sixth Circuit and not mentioned by the UMW is the Court's holding with respect to the membership of Grundy Mining Company in the unit:

> Furthermore, it is doubtful that Grundy Mining ever became a member of the multi-employer group. Its membership in Sewanee was conditioned upon a choice by its employees of the UMW as their bar-

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[3]See 423 F. 2d 170-177

gaining agent. Such condition was never, under our view, fulfilled. Additionally, the request by the Southern Labor Union for a separate election for the Grundy employees made clear that such employees did not intend to be part of a multi-employer unit. In NLRB v. Local 210 Internat'l Bhd. of Teamsters, 330 F. 2d 46, 12 A.L.R. 3d 800 (2nd Cir. 1964), the Court said: "One basic test is whether the multi-employer unit was created with the approval, express or implied, of the employees in each of the constituent single-employer units." 330 F. 2d at 47 (Emphasis supplied) 423 F. 2d 178.

The Court went on to quote a portion of the dissent from the Board's decision by Board Member Boyd Leedom:

> I construe Grundy's currently qualified application for membership in Sewanee as conditioned upon separate certification of a union as the majority representative of Grundy's employees. I would, therefore, direct a self determination election among Grundy's employees. If they select the same bargaining representative chosen by a majority of the employees in the multi-employer unit, I would approve them in that unit. On the other hand, in the event that Grundy's employees select a different representative, or no representative, they would be excluded from the multi-employer unit and either constitute a separate appropriate unit, or be unrepresented.

The Sixth Circuit finds that on two counts - the condition placed upon its members by its management representatives at the bargaining sessions that it would be a member only after its employees chose the UMW as its bargaining agent, and that the Grundy employees themselves clearly indicated that they did not wish to be represented by the UMW - Grundy was not a member of the unit.[4]

The UMW apparently concedes this point as it does not address itself to this issue at

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[4] It should be noted here that Consolidated and its wholly owned subsidiary, Grundy, were the dominant interests in the area, and at the present time are the only undertakings presently in operation. Thus, without Grundy, Consolidated and Products, the unit becomes virtually meaningless. The Trial Examiner's opinion as set out at Page A-55 of Respondents' Brief says in part: "While Consolidated was not named in the list attached to the petition in the representation proceedings, it owns and controls Grundy, and the record shows that Consolidated's application for membership, like that of Grundy and Products, was contingent only upon certification of UMW by the Board, which contingency, as the Board noted in its original decision and direction of election, has been fulfilled." The Sixth Circuit was of the opinion that this was not the contingency, and that the actual contingency, selection of the UMW by the Grundy employees, had not been fulfilled.

all. Therefore, regardless of the appropriateness of the unit as to the other respondents, as to Grundy and Consolidated the holding of the Sixth Circuit in accordance with the dissent of the Board Member Leedom clearly precludes their forced membership in the unit.

III

THE SIXTH CIRCUIT PROPERLY FOUND THAT THE ALLEGED VIOLATIONS OF SECTION 8(a) (1) and (2) OF THE ACT WERE BARRED BY THE SIX MONTH STATUTE OF LIMITATIONS OF SECTION 10(b) OF THE NATIONAL LABOR RELATIONS ACT.

As the Sixth Circuit points out in its opinion on pp. 179-180, the alleged violation as to Sycamore and Poplar occurred on July 16, 1964, the time of the execution of the contracts which contracts form the basis for the alleged violation. The charges were not filed until July 1, 1965, almost one full year after the alleged violation. Without question, the six months limitations period of Section 10(b) of the Act was not met, and, therefore, the finding of a violation in this respect was invalid. The UMW is completely silent on this issue and directs no portion of its argument to this question, again apparently conceding the validity of the Court's holding.

CONCLUSION

As has been seen, the Court corrected the error of the Board, applied the proper rules to the circumstances of the case and arrived at the only reasonable decision under these unusual circumstances. Respondents respectfully request that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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W. FERBER TRACY
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APPENDIX A

[fol. 1] UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD, TENTH REGION

SEWANEE COAL OPERATORS' ASSOCIATION, INC. Employer and UNITED MINE WORKERS OF AMERICA Petitioner	CASE NO. 10-RC-5497
GRUNDY MINING COMPANY Employer and LOCAL NO. 139, SOUTHERN LABOR UNION Petitioner	CASE NO. 10-RC-5593
M. A. PAYNE, INC. Employer and LOCAL NO. 139, SOUTHERN LABOR UNION Petitioner	CASE NO. 10-RC-5604
STEPHENSON BROS. COAL CO., INC. Employer and LOCAL NO. 139, SOUTHERN LABOR UNION Petitioner	CASE NO. 10-RC-5605

Appendix A

REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to the Board's Decision and Direction of Election issued on September 20, 1963, an election by secret ballot was conducted on October 15, 1963, among the employees in the appropriate unit to determine whether they desired to be represented, for collective bargaining purposes, by United Mine Workers of America, or by Local No. 139, Southern Labor Union, or by [fol. 2] neither.[1] Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approximately 660 eligible voters, 108 cast valid votes for UMW, 50 cast valid votes for SLU, none cast valid votes against the participating labor organizations, none cast void ballots, and 421 cast challenged ballots. Thus, the challenged ballots are sufficient in number to affect the results of the election.

On October 21, 1963, Grundy and SLU filed timely objections to the election.[2] UMW contends that neither Grundy nor SLU complied with the Board's Rules and Regulations with respect to proper service of their respective objections. This contention is discussed below.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation has been conducted regard-

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[1]The parties are hereinafter referred to as follows: Sewanee Coal Operators' Association, Inc. as Sewanee; Grundy Mining Company as Grundy; M. A. Payne, Inc. as Payne; Stephenson Bros. Coal Co., Inc. as Stephenson; United Mine Workers of America as UMW; and, Local No. 139, Southern Labor Union as SLU.

[2]The petitions in the above-captioned cases were filed on the following dates: Case No. 10-RC-5497 on February 25, 1963. Case No. 10-RC-5593 on May 23, 1963. Case No. 10-RC-5604 on June 6, 1963. Case No. 10-RC-5605 on June 6, 1963. These cases were consolidated by order of the undersigned issued on June 12, 1963.

ing the sufficiency of service of the objections and the issues raised by the objections and challenged ballots.[3] The undersigned, having considered the results thereof, makes the following findings and recommendations to the Board:

Service of Objections

Grundy's certificate of service of the objections, signed by its attorney, Judson Harwood, reads as follows:

> "I hereby certify that a copy of the foregoing objections have been mailed to E. H. Rayson, Attorney for U.M.W., Burwell Building, Knoxville, Tennessee and Ted Wilson, Attorney for Southern Labor Union, Oneida, Tennessee and William Ables, Attorney for Sewanee Coal Operator's Association, South Pittsburg, Tennessee, this 18th day of October, 1963."

SLU's certificate of service of the objections, signed by its attorney, Ted Q. Wilson, reads as follows:

[fol. 3] "I hereby certify that a true copy of the foregoing "Objections to Election" has been served upon William J. Turnblazer, president, District 19, United Mine Workers of America, Middlesboro, Kentucky; and upon United Mine Workers of America, 900 Fifteenth St., N.W., Washington, D.C.; and upon E. H. Rayson, Attorney for United Mine Workers, Burwell Building, Knoxville, Tennessee; and upon Grundy Mining Company, Tracy City, Tennessee; and upon Judson Harwood, Nashville Bank & Trust Building, Nashville 3,

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[3] By letter dated October 25, 1963, the parties were requested to submit a statement setting forth their contentions with respect to each allegation of the objections and to each challenged ballot together with any available evidence in support thereof.

Tennessee, by placing said copies in the United States mail, registered return receipt requested. This the 19th day of October, 1963."[4]

UMW contends that the Grundy objections were served upon the attorneys for UMW, SLU and Sewanee but were not served upon UMW, SLU, Sewanee, Payne or Stephenson. UMW further contends that the SLU objections, according to the certificate of service, were not served upon Sewanee, Payne or Stephenson.[5]

It is undisputed that copies of the objections were immediately served upon the attorneys of record of all parties to the proceeding. These same attorneys acted as agents of and represented the parties at the hearing and in unfair labor practice cases arising earlier this year. Under these circumstances, the undersigned is of the opinion that Grundy and SLU made adequate service of their objections.

The Objections

SLU Objection 1

An atmosphere of confusion and fear was willfully and deliberately created prior to the election and on the day of and during the election by responsible persons and by members of and workers for United Mine Workers of America. Prior to the election, a reign of terror was instituted in the area where those persons voting in the election lived. Threats of physical violence and reprisal were made by United Mine Workers

[4] Although SLU failed to show in its certificate that service of the objections was made upon Sewanee, SLU submitted during the investigation a U. S. Post Office return receipt dated October 21, 1963, showing that service was made upon William Ables, attorney for Sewanee.

[5] Payne and Stephenson are members of the Sewanee Coal Operators' Association, Inc.

members and retired United Mine Worker members against eligible voters.

Because of these threats and the immediate past history in the area which includes three killings, numerous dynamitings, shootings, beatings and picket line violence, as well as mob action against Southern Labor Union, Local No. 139 and its membership at
[fol. 4] Dunlap, Tennessee, many of the employees who were eligible to vote were afraid to go to the polls through the milling mass of United Mine Workers members and sympathizers. Out of the 305 employees listed by the Employer Association as eligible voters, only some 200 appeared and cast ballots. Thus, one-third of the eligible voters were deprived of the right to vote by fear. Those who did vote were unable to make a free choice in the atmosphere which prevailed, as is guaranteed under the law.

By massing persons who were ineligible to vote in the entrance to the polls and having some of them vote challenged ballots, the United Mine Workers managed to prolong the election beyond its appointed hours and until after dark had descended. In the dark of night, several eligible employees refused to even try to vote for fear of "Getting a knife in the ribs while we were trying to vote."

SLU Objection 3

The United Mine Workers of America and its supporters, members and responsible officers remained in and electioneered in the area immediately adjacent to the polls during the time the election was being held. United Mine Workers of America election workers, wearing placards on their backs saying "Vote for United

Mine Workers and be able to get a pension", circulated through the voting line, electioneering with the voters during the time the election was being held.

Grundy Objection 1

The Regional Director, after repeated requests, refused to permit the employees of Grundy Mining Company to vote at their place of work, which is customary in election cases. The Regional Director and his representatives were informed, that due to the fact there had been three murders and numerous other shootings growing out of the repeated efforts of Grundy employees to work in spite of a U.M.W. picket line, that many employees would be fearful of their personal safety unless they were permitted to vote at their place of work. Some 40 odd employees of Grundy Mining Company did not go to Jasper to vote or did not attempt to vote after getting there because of the coercive mob condition which existed at the polls.

Grundy, therefore, charges that a fair and full election was not held and all of the qualified vote who are employees of Grundy Mining Company were not afforded laboratory conditions in which to cast their vote.

Grundy Objection 2

Grundy also excepts to the fact that the voting was not completed until more than an hour and a half after the time prescribed in the Board's order for voting and that on this day it was dark in Jasper for more than an hour prior to the completion of the voting and this condition made the fearfulness of Grundy em-

[fol. 5] ployees even more acute.

Appendix A

Grundy Objection 3

Grundy also excepts to the conduct on the behalf of the United Mine Workers, that the said U.M.W. caused a great horde of people to congregate at or near the polling place and that the U.M.W. had solicited said persons under the pretense of "lending moral support." In view of the background of shootings and dynamitings which have occurred repeatedly in this city, this situation alone created a coercive atmosphere and certainly was not conducive to a laboratory condition for holding of said election.

Grundy further charges that the U.M.W. willingly and deliberately caused many people to offer to vote whom the U.M.W. knew had no possible qualification under the Board's order and this was intended to and did create a coercive atmosphere.

The investigation disclosed that on December 26, 1962, UMW through its District 19, Local 7224, Pocket Local 7083 and Palmer Local 5881, commenced an economic strike against Grundy. Thereafter, the strike was extended to the other Employers involved in this proceeding. Upon an amended charge (Case No. 10-CB-1402) filed May 29, 1963, by SLU, the undersigned issued a complaint against UMW Local 7224 alleging that on or about April 24, 1963, the Respondent instigated and participated in mob threats and violence against employees of Grundy to prevent them from meeting to organize, form, join, and assist SLU in violation of Section 8 (b) (1) (A) of the Act. On November 1, 1963, the Trial Examiner issued his decision finding a violation of Section 8 (b) (1) (A) as alleged in the complaint. Upon another amended charge (Case No. 10-CB-1401) filed May 29, 1963, by SLU, the

undersigned issued a complaint against UMW Local 7083 alleging that on or about May 7, 1963, the Respondent prevented employees of Grundy from reporting to work at its mine site at Tracy City, Tennessee, by massing at the access thereto and by committing and threatening to commit physical violence upon Grundy employees, in violation of Section 8 (b) (1) (A) of the Act. On October 25, 1963, the Trial Examiner issued his decision finding a violation of Section 8 (b) (1) (A) as alleged in the complaint.

In the opinion of the undersigned, the violations of Section 8 (b) (1) (A) of the Act which occurred since the filing of the petition in Case No. 10-RC-5497, [fol. 6] found by the Trial Examiner in Cases Nos. 10-CB-1401 and 10-CB-1402 constitute, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in the election.[6] Accordingly, the undersigned finds merit in those portions of SLU Objection 1 and Grundy Objection 1 relating to pre-election violence.

After the Board issued its Decision and Direction of Election, the undersigned decided to conduct the election at one central location in view of the fact that all the Employers were located in and around Marion County, Tennessee and because of the large number of employees on strike or in layoff status. On October 2, 1963, a Board agent conducted a conference with the parties for the purpose of making election arrangements including suggestions regarding the location of the polls. William Ables, Sewanee's attorney who is also an attorney for Grundy,[7] suggested Dunlap or Jasper, Tennessee as the

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[6] Dal-Tex Optical Company, Inc., 137 NLRB 1782; Playskool Manufacturing Company, 140 NLRB 1417; National Gypsum Company, 133 NLRB 1492.

[7] Grundy's other attorney, Judson Harwood, had previously informed the Regional Office that Ables would handle the election arrangements.

most appropriate location. UMW contended that the election should be conducted at Whitwell or Palmer, Tennessee. The undersigned, upon being apprised of these contentions, decided to conduct the election at Whitwell since that town appeared to be centrally located with respect to the eligible voters. Thereafter, the attorneys for Sewanee and Grundy objected to Whitwell on the grounds that the violence referred to above occurred in that area and would preclude a fair election. They also renewed their request that the election be conducted at Jasper where adequate law enforcement would be available in the event of any misconduct during the election.

The undersigned reconsidered the decision regarding the location of the polling place and decided that while no violence or other misconduct was anticipated, the election should be held at Jasper where the likelihood of such conduct would be minimized. Consequently, the election was conducted in a vacant store on the courthouse square at Jasper, Tennessee.

[fol. 7] An analysis of the eligibility list furnished by the Employers reveals that of approximately 280 employees listed, 199 voted in the election. With respect to Grundy employees, 108 of 155 employees shown on the list voted in the election. There has been no showing that Grundy was in fact prejudiced or that the secrecy of the election was impaired because of the location of the polling place. Moreover, the election was conducted at the location requested by the Employers. The Board has frequently held that the Regional Director has broad discretion in making arrangements with respect to conduct of election.[8] Since no abuse of this discretion has been shown, the undersigned finds Grundy's allegation regarding the location of the polls to be without merit.

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[8] Milham Products Co., Inc., 114 NLRB 1544.

UMW denied that it massed ineligible voters at the polls or caused a "great horde of people to congregate at or near the polling place," but admitted that it urged all employees of the Employers involved to vote. UMW, in support of this conduct, contends that the cessation of operations by some of the Employers prior to the election was temporary and thus, the employees of such Employers are eligible voters. According to the investigation, a large number of persons including strikers, nonstrikers, replacements and others were congregated on the sidewalk and street immediately outside the polling place before and during the polling period. This crown has been estimated to number from 200 to 2000 at various times.[9] The line of voters, from 4 to 6 deep, extended from the entrance to the polls down the sidewalk for a block or more. While the polls were open, several unidentified persons circulated about the voting line outside the polling place wearing placards reading "Vote for United Mine Workers and be able to get a pension." UMW denied that it furnished or authorized the wearing of such placards. UMW admitted that its representatives remained across the street from the voting place while the polls were open and answered inquiries by some employees regarding the correct name of their employers but denied that it engaged in any electioneering. Before opening the polls, the Board agent in charge of the election did not specify a no electioneering area but cautioned the representatives of the parties not to enter the polling place during the election. [fol. 8]

In the opinion of the undersigned, Grundy's and SLU's allegation that the UMW interferred with the election by causing ineligible employees to vote is without merit. The board has held that if, as alleged, a labor

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[9] The investigation also revealed that criminal court was in session on the date of the election.

organization caused persons to vote who were known by it to be ineligible, the mere fact that a disproportionate number of ineligible persons voted under challenge in the presence of other voters does not warrant the inference that such other voters were coerced to vote for such labor organization.[10]

During the election, although four Board agents were present and were assisted by two U. S. Marshals, the voting progress was retarded because of the large number of challenged ballots cast. Consequently, an undisclosed number of voters were in line at 5:00 P.M., the scheduled closing time. At that time, a Board agent was stationed at the end of the line and the voters then in line were given an opportunity to cast their ballots. Since darkness had ensued, lights were provided for the polling place.

The undersigned is of the opinion that Board agents acted properly by extending the voting hours to permit persons in line to vote. This action prevented the disenfranchisement of the voters who had presented themselves timely and through no fault of their own could not cast their ballots within the scheduled time. The unsupported contentions that this condition affected the results of the election appear to be mere suppositions. Accordingly, Grundy Objection 2 and that portion of SLU Objection 1 relative to the extension of the election hours are without merit.

There remains for consideration the allegations regarding the conditions existing at the entrance of the polling place during the election. There has been no allegation and the investigation did not show that any improper conduct occurred inside the building where the employees

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[10] Minerals and Metals Corporation, 110 NLRB 710; The Hitchcock Corporation, 110 NLRB 477.

voted. However, in the opinion of the undersigned, the pictorial evidence submitted during the investigation depicting the crowd massed at the entrance to the polling place and the placard electioneering by unidentified persons in behalf of UMW in the area immediately outside the polls and in close proximity to the voters waiting in line coupled with the background of violence hereinbefore described was sufficient to create an atmosphere of fear and confusion at the polls which raises substantial and material issues regarding the results of the election.[11]

[fol. 9]

In summation, the undersigned is of the opinion that the portions of Grundy Objection 1 and SLU Objection 1 relating to pre-election violence, and Grundy Objection 3 and SLU Objection 3 relative to electioneering near the polls by unidentified persons and the crowd congregated at the entrance to the polling place raise material and substantial issues with respect to the results of the election. All other allegations of SLU Objections 1 and 3 and Grundy Objections 1, 2 and 3 are without merit.

SLU Objection 2

The United Mine Workers of America, through its responsible representatives and membership, told employees that once the United Mine Workers of America had won this election all operators would have to sign the nation wide contract which would result in an immediate increase in wages and fringe benefits to all employees.

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[11] It is not material that the investigation did not reveal that the UMW was responsible for the massing of the individuals and the placard electioneering. "The important fact is that such conditions existed and that a free election was thereby rendered impossible." Diamond State Poultry Co., Inc., 107 NLRB 3, 6.

SLU did not submit any evidence in support of this allegation and none was adduced during the investigation. UMW denied that such statement was made. Therefore, SLU Objection 2 is without merit.

Grundy Objection 4

Grundy Mining Company excepts to the holding of an election on a multi-employer unit on the grounds that the statute does not so authorize. The only employees in the entire area who have worked in more than a year are the employees of Grundy Mining Company, which employees have, to the best information of Grundy, voluntarily affiliated with the Southern Labor Union, and to permit former employees of other employers to prevent an employee of Grundy to have a qualified bargaining agent of their own choosing is contrary to the statute, purpose and intent thereof.

This allegation constitutes an objection to the Board's finding of the appropriate unit in its Decision and Direction of election. It is well established that the Board [fol. 10] will not consider objections to an election which raise the propriety of the voting groups in which the elections were directed, for the reason that such questions have already been fully considered and litigated in the representation hearing.[12] Therefore, the undersigned finds no merit to Grundy Objection 4.

Challenged Ballots

On the date of the election, an economic strike which commenced December 26, 1962, was still in progress.

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[12] William R. Whittaker Co., Ltd., 94 NLRB 1151; M & S Morenci Corporation, 100 NLRB 1114; United States Gypsum Company, 107 NLRB 122.

Appendix A

As a result of the strike, certain members of Sewanee ceased operations either temporarily or permanently, whereas others continued operations. As a result, the persons who voted in the election consisted of working employees, strikers, replacements and laid off employees. During the election, 421 challenged ballots were cast. A complete list of the challenges is attached hereto marked "Appendix A." The payroll eligibility periods were December 21, 1962 for Sewanee and Stephenson; September 13, 1963 for Grundy; and February 23, 1963 for Payne. Of the total number of challenges, UMW challenged 42 persons (all on the Grundy eligibility list) as being either guards or supervisors. The Board agent challenged 379. persons whose names were not on the eligibility list furnished by the Employer. The latter group consists of alleged strikers and laid off employees.

Sewanee contends that only the employees of the following Employers are eligible voters since these Employers are in business and intend to remain in business:

Thomas Coal Company
M. A. Payne, Inc.
O. L. Ellis Coal Company, Inc.
Tracy City Coal Company, Inc.
Cates Coal Company
Cunningham Coal Company
Good Springs Coal Company, Inc.
Ninth West Coal Company, Inc.
Martin Coal Company
J. W. Sanders Coal Company, Inc.
North End Coal Company
Grundy Mining Company

[fol. 11] Appendix A

Sewanee further contends that the employees of the following Employers are not eligible voters since such Employers permanently ceased operations prior to the election:

Willis Flynn Coal Company
Howard Higgins Coal Company
Cordell Coal Company
C. P. Hunziker Coal Company
James Leon Patton Coal Company
J. R. Patton Coal Company
Hubert Fults Coal Company
Clear Creek Coal Company
Stephenson Bros. Coal Co., Inc.
Leon Nunley Coal Company
Frank Hunziker Coal Company
Kelly Creek Coal Company
East Coal Company
Whitwell Mountain Coal Company
Tennessee Products & Chemical Company
Marshall Meeks Coal Company
Tennessee Consolidated Coal Company
Whitwell Coal Company
R & S Coal Company
Hoyt Rogers Coal Company
Basham Coal Company

UMW contends that the employees of all the aforementioned Employers are eligible voters and that the contention that they are no longer in business is made for the purpose of disqualifying voters known to be favorable to the UMW. SLU did not submit any position during the investigation regarding the challenged ballots.

In the opinion of the undersigned, the conflicting contentions with respect to the identify of the Employers who permanently ceased operations prior to the election thus affecting the eligibility of certain employees shown in Appendix A and the status of the persons challenged as being supervisors and guards raise issues which may be best resolved by record testimony at a hearing.

CONCLUSIONS AND RECOMMENDATIONS

For the reasons stated above, the undersigned recommends to the Board that:

(1) Those portions of Grundy objections 1 and 3 and SLU objections 1 and 3 relating to pre-election violence, electioneering by unidentified persons and the crowd congregated at the entrance to the polling place raise material and substantial issues affecting the results of the election and pre-
[fol. 12] vented the exercise of a free choice of the voters in their selection of a bargaining representative. For this reason, the election should be set aside and a new election directed, subsequent to the hearing hereinafter recommended.

(2) Grundy objections 2 and 4 are without merit and should be overruled.

(3) SLU objection 2 is without merit and should be overruled.

(4) A hearing before a Trial Examiner of the Board be directed to resolve the issues raised by the 421 challenged ballots herein.

Issued at Atlanta, Georgia, this 17th day of December, 1963.

Appendix A

WALTER C. PHILLIPS

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Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 219

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

BASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS d/b/a CHERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, Formerly CLEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL COMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMPANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODSPRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS and/or AUSTIN MATTHEWS d/b/a HICKORY COAL COMPANY, HOWARD HIGGINS COAL COMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL COMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, ALTON JOHNSON d/b/a MAPLE COAL COMPANY, MARTIN COAL COMPANY, MARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END COAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON d/b/a HUBERT FULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL COMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN d/b/a POPLAR COAL COMPANY, JOSEPH H. GRAHAM d/b/a PINE COAL COMPANY, R & S COAL COMPANY, J. W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., ALTON JOHNSON d/b/a SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, TENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL THOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY and NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF OF RESPONDENT TENNESSEE PRODUCTS AND CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1650.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

v.

ASHAM COAL COMPANY, CATES COAL COMPANY, MARSHALL MEEKS, D/B/A HERRY COAL COMPANY NO. 15, JAMES CAMPBELL COAL COMPANY, FORMERLY LEAR CREEK COAL COMPANY, COAL CREEK COAL COMPANY, CARDELL COAL OMPANY, CUNNINGHAM BROTHERS COAL COMPANY, O. L. ELLIS COAL COMANY, WILLIS FLYNN COAL COMPANY, HUBERT FULTZ COAL COMPANY, GOODRING COAL COMPANY, GRUNDY MINING COMPANY, HOWARD HIGGINS AND/OR USTIN MATTHEWS D/B/A HICKORY COAL COMPANY, HOWARD HIGGINS COAL OMPANY, C. P. HUNZICKER COAL COMPANY, FRANK HUNZICKER COAL OMPANY, ALTON JOHNSON COAL COMPANY, KELLY CREEK COAL COMPANY, LTON JOHNSON D/B/A MAPLE COAL COMPANY, MARTIN COAL COMPANY, ARSHALL MEEKS COAL COMPANY, 9TH WEST COAL COMPANY, NORTH END OAL COMPANY, LEON NUNLEY COAL COMPANY, EARL PATTON D/B/A HUBERT ULTZ COAL COMPANY, J. R. PATTON COAL COMPANY, LEON PATTON COAL OMPANY, M. A. PAYNE, INC., H. WILLIS FLYNN D/B/A POPLAR COAL COMANY, JOSEPH H. GRAHAM D/B/A PINE COAL COMPANY, R & S COAL COMPANY, W. SANDERS COAL COMPANY, STEPHENSON BROTHERS COAL COMPANY, INC., LTON JOHNSON D/B/A SPRUCE COAL COMPANY, SYCAMORE COAL COMPANY, ENNESSEE CONSOLIDATED COAL COMPANY, TRACY CITY COAL COMPANY, VIRGIL HOMAS COAL COMPANY, TRUSSELL COAL COMPANY, WALNUT COAL COMPANY AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF RESPONDENT TENNESSEE PRODUCTS AND CHEMICAL CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Tennessee Products & Chemical Corporation (Tennessee Products), prays the Court to deny the petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) entered March 5, 1970, in *Tennessee Products & Chemical Corporation v. National Labor Relations Board*, No. 18,357 and *National Labor Relations Board v. Basham Coal Co., et al.*, No. 18,463. Therein, the Sixth Circuit denied enforcement to a bargain order of the Board that would have required Tennessee Products & Chemical Corporation and other respondents to bargain with the United Mine Workers of America (UMW), as part of a multi-employer bargaining unit. Said order of the Board had held that Tennessee Products refusal to bargain with the UMW constituted a violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq.)

STATEMENT OF FACTS.

The following facts are supplementary to those set forth in the Petition. Such facts relate only to Tennessee Products & Chemical Corporation and are material to the issues framed in *Tennessee Products & Chemical Corporation v. National Labor Relations Board*, No. 18,357 below.[1]

Tennessee Products terminated its coal mining operations in January of 1962, and it terminated all of its coal mine employees at that time (J. A. 88a; Tr. page 88, line 7), except that it continued to employ three "tipple employees" in connection with the continued purchase and sale of coal. In March, 1963 (Tr. page 88, line 7), Tennessee Products discontinued these three employees from its payroll and abandoned the purchase and sale of coal. The strike that began in the southeastern Tennessee coal field on December 26, 1962, was the proximate factor in the initial decision to discontinue operations (J. A. 46a-47a).

In June, 1963, the Board held hearings in the underlying representation cases (J. A. 1a). Based upon facts developed in those hearings, the Board, on September 20, 1963, issued a Decision and Direction of Election (J. A. 14a et seq.) wherein it made finding concerning the nature of Tennessee Products' operations and interest in the coal field as they existed *prior to June 1963*. (Emphasis added.)

On October 3, 1963, prior to the election, Tennessee Products wrote to the Board, through its attorney, and advised the Board that it had determined that it would not again re-engage in coal mining activities, and that it con-

1. Citations to the record shall conform to the practice used by the parties in the Sixth Circuit; namely: "J. A." references are to portions of the record printed in a Joint Appendix. References to the transcript of testimony in the unfair labor practice proceeding are designated "Tr." and references to the exhibits in such proceeding are designated as follows: General Counsel's Exhibits—"GCX"; Tennessee Products Exhibits—"PX"; Sewanee's Exhibits—"SX".

sidered the "tipple employees to be permanently separated as of the time they left the active payroll" (RPRX No. 4). The election was conducted on October 10, 1963 (J. A. 1a).

Between October, 1963, and June 1964, there were various procedural steps instituted by the Union involved and various other employers that resulted in hearings being opened before a Trial Examiner of the Board on June 16, 1964 (J. A. 1a-2a). On September 29, 1964, the Trial Examiner issued a Report (J. A. 32a) that dealt in part with changing conditions in the coal field that had occurred subsequent to the hearing held in June, 1963.

As to Tennessee Products, the Trial Examiner found that it had subleased all of its coal mining property in the area involved to another firm, and that on April 10, 1964, it had cancelled its agreement with twenty-five operators who had formerly operated coal mines on its leasehold. Moreover, it had advised such operators to the effect that if they desired to continue to mine and sell coal, they should contact the new sublessee (J. A. 38a-39a).

There is no evidence in the Record before this Court to establish that any time subsequent to the Report of September 29, 1964, that Tennessee Products re-engaged in the mining, purchase or sale of coal, or that it hired or rehired any employees.

Ultimately, in June, 1965, the Board issued its certification that gives rise to this case (J. A. 2a). The certification was followed by the UMW's demand for bargaining of June and July, 1965; the unfair labor practice charge against Tennessee Products of March, 1966; and, the Complaint of April 8, 1966.

At the time the certification issued, Tennessee Products had not operated a coal mine for a period in excess of three years. At the time the certification issued, Tennessee Products had not operated its tipple or had any tipple employees on its payroll for a period in excess of two years.

At the time it was first charged with unfair labor practices, Tennessee Products had not mined coal for over four years, and had not had any active employees for over three years.

In his Complaint (GCX No. 1f, paras. 6, 7 and 14), the General Counsel expressly alleged that Tennessee Products was engaged in the purchase and sale of coal. Tennessee Products specifically denied such allegation in its Answer (GCX No. 1n). Tennessee Products had previously filed a Motion for a Bill of Particulars (GCX No. 1k) specifically seeking to ascertain the General Counsel's position concerning its non-operational status and its lack of employees. The General Counsel opposed such Motion (GCX 1-l), and it was denied (GCX No. 1j). Subsequently, in his Response to a Motion to Dismiss (GCX No. 1mm), the General Counsel stated that the issue as to *whether Tennessee Products was or was not operating or whether or not it had employees at the time of the certification was immaterial to his theory of the case.* (Emphasis added.) This position was repeated at the unfair labor practice hearing below (Tr. page 87, line 12).

In the context of the foregoing facts, neither the General Counsel nor the UMW offered or made any attempt to offer any evidence to support the allegations that Tennessee Products was engaged in the business of purchasing or selling coal. Moreover, no evidence was produced by either the General Counsel or the UMW to establish that Tennessee Products had, at the time of the certification or the unfair labor practice charge, any employees subject to the certification. The only record evidence bearing on these points is the uncontradicted testimony of a corporate officer, who is a member of the Bar, to the effect that Tennessee Products was not operating and had no employees covered by the certification at any time material to this matter (Tr. page 87, et seq.).

The General Counsel made no effort to sustain the burden of proof with reference to the allegations of his Complaint as to Tennessee Products' operational status, nor did he establish that Tennessee Products, at times material to this matter, employed any persons or employees covered by the certification.

Despite this fact, the Trial Examiner found, and the Board sustained such finding, that at all times subsequent to July, 1965, Tennessee Products had engaged and was engaged in unfair labor practices in violation of Section 8(a)(5) of the Act by refusing to meet and bargain with the UMW as part of the multi-employer bargaining unit that had been certified by the Board (J. A. 60a-61a, 99a-100a). Tennessee Products, in a further effort to separate itself from this litigation due to its non-operational status, thereupon filed a Motion for Reconsideration and, in the alternative, a Motion for Reopening of the Record (A1-A10; J. A. 133(a) et seq.). Tennessee Products was attempting to secure a further opportunity to demonstrate to the Board that it had in fact, no employees at the time the certification was issued. Such motions were denied by the Board in an Order issued October 9, 1967 (A11-A13; J. A. 142(a) et seq.).

Thereafter, Tennessee Products petitioned for review of the Board's Order in Case No. 18,357 below. In the Court of Appeals, the Board and the UMW shifted from their previously held position as to Tennessee Products continuing obligation to bargain under the Order in litigation. Both the General Counsel and the UMW admitted before the Court that Tennessee Products had, in fact, no obligation to bargain if it did not resume operations.

The Board in its brief stated:

> "The Board is not ordering Products to resume operations and, contrary to Products' contention (Brief p. 23), it is not ordering Products to bargain with the

UMW if it chooses not to resume operations. The Board has specified that any employer who 'continues completely inoperative and outside the unit . . . may avoid the obligation imposed' by its bargaining order (J. A. 95a)."

"After the Board's decision and order issued, Products sought to reopen the record to litigate further its non-operational status (J. A. 133a-142a). Because Products did not present anything material in support of such motion which had not been considered previously, the Board's refusal to grant the motion did not deprive Products of due process of law (J. A. 143-144a)."

Similarly, the UMW in its brief took the position:

"Apparently the Respondents construe the Decision and Order to mean that inoperative companies must recognize and bargain with UMW. This is an erroneous construction and it indicates that the Respondents have either overlooked the language quoted above or have injected this issue as a red herring. The Board did not rule, and certainly does not contend, that a Respondent who is completely inoperative must resume operations and bargain in order to avoid the obligation of the Order or a subsequent citation for contempt. The explicit language in the Decision and Order is to the contrary: A Respondent who "continues completely inoperative and outside the unit . . . may avoid the obligation imposed by the Order . . ." (J. A. 95a)."

The majority opinion did not reach the point argued by Tennessee Products since it denied enforcement of the Board's Order on other grounds. The dissent, however,

adopted the reasoning of the Board and the UMW, as advanced in their brief in the following terms:

> "THE EFFECT OF 'GOING OUT OF BUSINESS'"
>
> "Tennessee Products and other of the former operators contend that they are not in the business of mining coal, have not been in that business for years, and never intend to go back into that business. The Board order applies, however, only to those who do go back into business. The order specifies that any employer "who continues completely inoperative and outside the unit . . . may avoid the obligation imposed." Obviously, as long as some operators do not go back into operation, the Board order would be completely ineffective as to them, but it could also do no damage.
>
> In view of the nature of the Board's order, the motion to reopen proofs to show Tennessee Products' non-operational status was properly denied."

It would appear the dissenting Judge would have enforced the Board's Order finding the Tennessee Products had committed a violation of Section 8(a)(5) of the Act by virtue of its failure to bargain with the UMW, but, on the other hand, would hold such Order to be "completely ineffective" as to Tennessee Products since it had no employees in the classifications covered by the certification. Left unexplained in the position of the dissenting Judge, the Board, and the UMW is the question as to why Tennessee Products, with no employees in 1965, had violated the Act because of its failure to meet and bargain with UMW at such time.

THE REASONS FOR DENYING THE WRIT.

I.

The Sixth Circuit Did Not Err in Holding That Employers Could Unilaterally Withdraw From a Multi-Employer Unit, and Thereby Destroy the Existence of the Unit After the Start of Collective Bargaining on the Facts of This Case.

Tennessee Products here seeks denial of the petition for Writ of Certiorari only as it relates to Tennessee Products individually.

Tennessee Products had no employees covered by the certification in 1965 and has had none at any time since. Further, Tennessee Products has no intention of ever again employing any such classes of employees; it is in the process of corporate liquidation; and, it will shortly be surrendering its leaseholds over the coal lands involved in this litigation. However, it would appear that the logic of the Sixth Circuit, in denying enforcement of the Board's Order due to "unusual circumstances" cannot be attacked based upon the facts on the record before this Court.

In its creation of the multi-employer unit, the Board relied exclusively on facts *as they existed* (emphasis added) in the period prior to 1964. Thereafter, in seeking to enforce the obligation to bargain growing out of its certification, the Board gave no consideration to any of the changes that had taken place in the coal field subsequent to that time. The record here demonstrates that the majority of the employers and firms who had engaged in the formation of the multi-employer unit were no longer even in existence at the time the Board issued its certification. In attempting to enforce its certification in an unfair labor practice proceeding commenced in 1966, the Board made

no effort to ascertain or discover exactly what persons or firms were actually in existence in order to establish those persons who had some alleged duty to bargain pursuant to the certification. In effect, the Board's position throughout has been that it would first indict and convict all persons with some previous connection to the multi-employer unit and, then, after the fact, separate out those who had some obligation from those who had no obligation. Orderly collective bargaining on a multi-employer basis would, of course, have been impossible under such conditions. In any case, in view of the lengths of time between the initial recognition of the UMW by the group, the initial futile negotiations, the commencement of the strike, and the eventual issuance of the Board's certification, the Sixth Circuit is more than justified in refusing to abide by the normal rule of law in the "unusual circumstances" of this case.

The Sixth Circuit has not issued a precedent which weakens multi-employer bargaining or that has a significant bearing on national policy. Its decision is not in direct conflict with decisions of other circuits and the Board. Instead, the Circuit has merely refused to blindly apply an otherwise sound general principle to special facts "in unusual circumstances", which would have resulted in a distortion and perversion of such sound principle.

II.

The Sixth Circuit Did Not Exceed the Permissible Limits of Judicial Review When It Held That the Board Had Erred in Finding Appropriate a Multi-Employer Unit of Coal Companies Which Had Voluntarily Undertaken to Bargain on a Multi-Employer Basis With the UMW.

The petition for a representative election which gave rise to this matter was filed early in 1963. The certification that followed therefrom was issued in June, 1965. The

Board, in creating the multi-employer unit, totally ignored the facts and events that occurred in the interval and mechanically applied its rule as to withdrawal from and destruction of multi-employer bargaining units to the facts of this case. The Sixth Circuit properly denied enforcement of the Board's Order in light of the existence of a factual situation that is totally unique in experience and the history of the enforcement of the Act.

In so doing, the Court below has not exceeded the permissible limits of judicial review by refusing to become a party to the enforcement of an Order that would not have effectuated or fostered the basic purposes and policies of the Act.

CONCLUSION.

The considerations favoring the grant of a writ of certiorari are not here present. There is no essential conflict between the decision of the Sixth Circuit and other circuits or the Board. These cases turn upon their own special facts and no important question of Federal law or policy is here involved. Due to the unusual circumstances present, for the reasons assigned, the Respondent, Tennessee Products, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 10-CA-6350.
SEWANEE COAL OPERATORS ASSOCIATION, ET AL.

AND

UNITED MINE WORKERS OF AMERICA AND DISTRICT #19, UNITED MINE WORKERS OF AMERICA

CASE NO. 10-CA-6172.
SYCAMORE COAL COMPANY, INC.

AND

UNITED MINE WORKERS OF AMERICA

AND

SOUTHERN LABOR UNION, LOCAL NO. 139,
Party to the Contract.

espondent Tennessee Products & Chemical Corporation's Motion for Reconsideration and or Reopening of the Record.

Comes now Respondent Tennessee Products & Chemical orporation, hereinafter referred to as Respondent Prod-

nets, with this Motion for reconsideration and/or reopening of the record in the instant matter.

In support of such Motion Respondent Products submits the following reasons and arguments.

I. EXPLANATION OF REFERENCES:

The facts material and relevant to the instant proceeding span the period between 1962 and 1967. There are a number of published Board decisions and reports that cast light on the instant matter. In order to make meaningful references to such decisions and reports, and to the record and evidence in the instant matter, the following designations will be employed in this Motion:

1. Tr.—Transcript of testimony in the instant case.
2. GCX—General Counsel's exhibits in the instant case.
3. RPX—Respondent Products' exhibits in the instant case.
4. RPRX—Pespondent Products' rejected exhibits in the instant case.
5. TXD—The Trial Examiner's Decision in the instant case.
6. 1963 D D—The Board's Original Decision and Direction of Election dated September 20, 1963.
7. Boyls' Report—Trial Examiner Boyls' Report on Challenged Ballots and Events affecting Composition of Unit dated September 29, 1964.

II. RESPONDENT PRODUCTS' NON-OPERATIONAL STATUS:

A fundamental and material error in the Board's Decision and order (167 NLRB No. 12) stems from its failure

to reverse the Trial Examiner and find that Respondent Products had no obligation to bargain because it had withdrawn from active participation in the mining, purchasing and selling of coal and had no employees either active or inactive in the alleged bargaining unit.

Respondent Products terminated its coal mining operations in January of 1962, and it terminated all of its coal mine employees at that time (Tr., page 87, line 20, et seq.; 1963 D+D, page 2, line 22; Boyls' Report, page 4, line 14; RPX No. 2). There was no dispute about such fact; such evidence is uncontradicted on the record, and it was not challenged by either the Union or the General Counsel in the hearing in this case.

Until March of 1963, the Company continued to buy and sell, and had either two or three "tipple employees" engaged in such activity. It is uncontradicted in the record that such employees were terminated in March, 1963 (Tr., page 88, line 7), and that at no time after March, 1963, has the Company engaged in the coal business (Tr., page 88, line 11). The issue as to whether or not these persons still have any continuing relationship with the Company was *not* litigated at the hearing. Although, General Counsel had alleged in his Complaint (GCX No. 1f) that Respondent Products was still engaged in the business of purchasing and selling coal, and Respondent Products in its Answer (GCX No. 1n) had specifically denied such allegation, the General Counsel made no attempt to prove his allegation at the hearing.

Moreover, General Counsel and the Union made no effort to controvert or challenge the uncontradicted testimony of the Company's witness to the effect that the three individuals under discussion were deemed by the Company to have been terminated in March of 1963 (Tr., page 88, line 7).

It must be recalled that under General Counsel's theory of the case, as stated at the hearing (Tr., page 87, line 12), and in his response to Motion to Dismiss (GCX No. 1mm), the issue as to whether a respondent was or was not operating or had employees was immaterial to his theory of the violation.

Notwithstanding the fact that nothing in the General Counsel's evidence puts into issue Respondent Products' position that it had no employees of any sort or description at the time the certification was issued, the Trial Examiner has made a finding that these alleged employees were still on "layoff" in June of 1965 (TXD, page 15, line 42 et seq.).

Respondent Products in its Exception No. 19 sought reversal of this error on the part of the Trial Examiner.

There is no evidence in this proceeding or in any other proceedings to the effect that these persons were filling jobs within the bargaining unit covered by the certification. As far back as October, 1963, Respondent Products had advised the Board that such persons were not in classifications covered by the certification (RPRX No. 4). In addition, there is no evidence in the record of this case, or of any prior case concerning the duties of the individuals involved. It is to be recalled that the Union called a strike on December 26, 1962 closing down all the mines involved in these proceedings (Boyls' Report, page 2, line 42). The fact that the three individuals under discussion continue to work until March of 1963 adds weight to the Company's argument that they were in positions not represented by the Union. The fact that this present position that these employees were not part of the bargaining unit is not an afterthought on the part of Respondent Products is best demonstrated by reference to the Company's letter of October 3, 1963 (RPRX No. 4, page 2).

In October, 1963, the Company wrote to the Board stating that these individuals had been "permanently separated" (RPRX No. 4). In Boyls' Report, page 9, line 24, it is clear that the Examiner there was aware of the termination of such persons because they are clearly referred to in the past tense. At least by the time the hearings were held in June, 1964, there was no question as to termination.

No matter what the facts may have been in 1963 and in 1964, such facts cannot be relied upon or be held determinative as to what were the "facts" in June of 1965, when the Union made its bargaining request. The situation at *that time* is controlling here.

At that time, and at all times since, the Company had no operational employees of any type or nature engaged in the coal business. The Company had not mined coal for over three years or bought or sold coal for over two years.

A corporate officer of Respondent Products (Tr., page 87, line 3), a member of the Bar, with access to the book and records (Tr., page 87, line 9) testified that the Company regarded such persons as having been terminated in 1963 (Tr., page 88, line 9). This uncontradicted testimony, which was not even subjected to cross-examination by either the General Counsel, the Union or the Trial Examiner, is sought to be avoided because the witness, when later questioned concerning various lease arrangements and details of leases, truthfully stated that he did not have full knowledge as those aspects of the Company's operations. The witness' lack of knowledge as to one facet of the operation does not demonstrate that he was not fully qualified to testify as to other facts with which he was familiar. Particularly in a situation wherein none of the parties took issue with or challenged such testimony.

Respondent Products has been deprived of due process of law by virtue of the Board sustaining the Trial Examiner in these findings. The General Counsel and the Union did not litigate this issue. On the face of the pleadings and General Counsel's announced theory of the case, Respondent Products has been taken by surprise by a finding that it still has employees.

In its Motion for Bill of Particulars (GCS No. 1k), Respondent Products specifically sought to ascertain General Counsel's position as to the existence or non-existence of employees (See Paragraphs 8, 9, 10, 11 and 12). General Counsel opposed such Motion (GCX No. 1). A Trial Examiner denied such Motion (GCX No. 1jj).

Under these circumstances, Respondent Products requires, at a minimum, a further opportunity on the record to nullify the erroneous findings by the Examiner.

Respondent Products is confident that the Board, after it has considered the uncontradicted evidence; General Counsel's theory of the case and his lack of interest in litigating this aspect of the case; and, the length of time that transpired between the time these people left the Company's employ and the date of the certification issued, and will, on these grounds, reverse the Trial Examiner in this regard.

The actual practical fact is that at the time the certification was issued and at all times since, Respondent Products had no employees even remotely connected with the bargaining unit. Moreover, there exists no plans or programs whereby the Company intends to resume mining or purchase and sale operations in the future. Those being the facts, and the uncontradicted facts, Respondent Products is unable and has been unable to understand just what is expected of it.

Objective consideration of the record here demonstrates that Respondent Products withdrew from the

status of an "employer" long before the issuance of the certification, long before the filing of these Charges and long before the issuance of the instant Complaint. Moreover, the record contains no evidence to demonstrate that there was anything unlawful, illegal or improper in such actions.

A Company without employees, in the absence of some unlawful reason to account for the absence of such employees, has no obligation to bargain with a Union. In the absence of any obligation to bargain, there can be no unfair labor practice. If there can be no unfair labor practice, there can be no lawful Board order to remedy such non-existent unfair labor practices.

In summary as to this point, there is clear and uncontradicted evidence in the record to establish that Respondent Products' has no employees covered by the disputed certification. Moreover, General Counsel made it clear throughout his case that he was not challenging or litigating Respondent Products non-operating status. In the alternative the Board should either dismiss the Complaint as to Respondent Products or reopen the record to permit Respondent Products to fully litigate this issue.

III. FACTS OCCURRING SUBSEQUENT TO THE HEARINGS HEREIN:

Certain facts and transactions have occurred subsequent to the closing of the record herein which impel the conclusion that the record should be reopened in order that the Board properly evaluate Resopndent Products obligations and duties with reference to the certification involved in this litigation.

The Trial Examiner issued his Decision on March 28, 1967. Thereafter, under date of April 17, 1967, Respondent Products received a letter from the Mine Work-

ers requesting a meeting for the purpose of negotiating a contract. Respondent Products responded to such letter and stated that it would meet with the Union. On May 9, 1967, representatives of Respondent Products met with representatives of the Mine Workers in Nashville, Tennessee.

At such meeting Respondent Products again disclosed that (1) Respondent Products had no employees within the bargaining unit; (2) Respondent Products, except as a landlord, had no interest in or connection with any other persons or firms engaged in mining or selling coal; (3) Respondent Products had no intention of resuming active participation in the coal industry; (4) Respondent Products did not intend to renew its lease with the Tennessee Coal and Iron Company at the end of its current term; and (5) Respondent Products lack of interest in and/or control over the activities and affairs of any of the other persons or firms that are respondents in this case.

Notwithstanding these facts, it was the position of the Union representatives that the Mine Workers expected Respondent Products to either enter into a contract that would cover the employees of other persons or firms who are sub-lessees of Respondent Products or somehow cause such other persons or firms to themselves enter into agreements with the Union. Respondent Products rejected such proposals on both legal and practical grounds and the meeting ended on that note.

Evidence concerning such meeting should be before the Board in connection with this case. The fact that such a meeting took place and the results of such a meeting sustains Respondent Products' position with regard to the fact that it is not and was not properly a party to this case.

Respondent Products has no employees of its own, and will not and cannot become a party to any agreement covering employees over which it exerts no control. Further,

it lacks legal right or authority to bind any other firms or employers to a labor contract, and it would undoubtedly open itself to serious financial liability if it attempted to exercise any such right.

There are additional events which have taken place since the close of the record herein which Respondent Products desires to place before the Board. Under date of July 11, 1967, the Board of Directors of Respondent Products adopted a Resolution calling for the complete liquidation and dissolution of the Corporation. Under the terms of the plan for liquidation and dissolution, which was approved by a special meeting of the stockholders on August 21, 1967, the Company expects to cease active conduct of its business as promptly as is practicable and in any event by 1970.

In light of Respondent Products' unique status in relationship to this case, it is unfair and unjust to continue Respondent Products as a respondent to protracted litigation which is and has been moot insofar as Respondent Products is concerned. The fact that Respondent Products is now on public record as being in a position of going out of business entirely supports its many prior assertions in this case that it does not intend to resume operations in the coal industry.

As a practical matter, it is highly probable that Respondent Products will have ceased to exist before there is ever any bargaining pursuant to the certification.

IV. SUMMARY:

Respondent Products has been attempting to separate itself from this litigation since its beginning. Respondent Products was not named as a respondent until it received an amended Charge on April 1, 1966. At that point in time it had not engaged in coal mining operations for fifty-two months, and it had not purchased or sold coal for thirty-

seven months. In an effort to bring its non-operating status to the attention of the Board, it filed a Petition seeking either a Unit Clarification or an Amendment of Certification. Such Petition, still not acted upon, is before the Board in this case (RPX No. 15; Tr., page 108, line 22, et seq.). Respondent Products respectfully moves that the Board either reconsider its Decision and Order with regards to Respondent Products or reopen the record herein so that Respondent Products non-operating status can be fully litigated. In the present posture of this case, Respondent Products has been and is being deprived of due process of law.

Respectfully submitted,

/s/ GEORGE A. BURNSTEIN,
George A. Burnstein,
KLEINBARD, BELL & BRECKER,
1908 Fidelity Building,
Philadelphia, Pennsylvania,
Attorneys for Respondent,
Tennessee Products & Chemical Corporation.

September 7, 1967.

APPENDIX B.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 10-CA-6350.
SEWANEE COAL OPERATORS ASSOCIATION ET AL.,[1]

AND

UNITED MINE WORKERS OF AMERICA AND DISTRICT #19, UNITED MINE WORKERS OF AMERICA.

CASE NO. 10-CA-6172.
SYCAMORE COAL COMPANY, INC.

AND

UNITED MINE WORKERS OF AMERICA

AND

SOUTHERN LABOR UNION, LOCAL NO. 139,
Party to the Contract.

Order Denying Motions.

On August 22, 1967, the National Labor Relations Board issued a Decision and Order[2] in the above-entitled

1. As listed in footnote 1 of Board's Decision and Order.
2. 167 NLRB No. 12.

proceeding, adopting, with certain modifications, the findings and conclusions of the Trial Examiner, and as its Order, the Recommended Order of the Trial Examiner as contained in his Decision of March 28, 1967. The Trial Examiner had found that certain of the Respondents have violated the National Labor Relations Act, and recommended that they take certain specific action to remedy such unfair labor practices.

Thereafter, on September 11, 1967, Respondents Grundy Mining Company and Tennessee Consolidated Coal Company filed a joint motion that the Board reconsider its decision and order, and reopen the record in the proceeding, alleging that the language used in the decision "is so vague and indefinite that it lends itself to several interpretations." On the same day, Respondent Tennessee Products & Chemical Corporation, herein called Respondent Products, also filed a motion that the Board "either reconsider its Decision and Order with regards to Respondent Products or reopen the record herein so that Respondent Products non-operating status can be fully litigated." On September 18, 1967, Southern Labor Union, Local Union No. 139, filed a motion that the Board reopen the record and reconsider the extent to which the United Mine Workers of America engaged in competition with Respondents. On September 25, 1967, the United Mine Workers of America filed opposition to the motion filed by Southern Labor Union, Local Union No. 139.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the motions filed by Grundy Mining Company and Tennessee Consolidated Coal Company, by Tennessee Products & Chemical Corporation, and by Southern Labor Union, Local Union No. 139, be, and they

hereby are, denied on the ground that they contain nothing not previously considered by the Board.

Dated, Washington, D. C., October 9, 1697.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

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JUN 25 1970
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No. 219

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION; NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1650

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

TENNESSEE PRODUCTS & CHEMICAL CORPORATION, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board concluded that 41 coal mining companies were part of an appropriate multi-employer bargaining unit and that their refusal to bargain with petitioner Union, the certified representative of the employees in that unit, violated Section 8(a)(5) and (1) of the National Labor Relations Act (Pet. App. A40-A83). The Board ordered the companies, *inter alia*, to bargain, on request, with the Union

(Pet. App. A81). The factual findings underlying the Board's decision may be summarized as follows:

In September 1962, 41 companies engaged in coal mining in three counties in Southeastern Tennessee formed the Sewanee Coal Operators Association (Sewanee) to represent them for collective bargaining purposes. Sewanee negotiated with the Union on a multi-employer basis between September 1962 and January 1963; four bargaining sessions were held, but no agreement was reached. In late December 1962, the employees represented by the Union struck the members of Sewanee, causing the members' mines to shut down. That strike continues (Pet. App. A48-A49).

In February 1963, the Union petitioned the Board for a certification as the representative of the employees of the members of Sewanee in a multi-employer unit. The Board found the multi-employer unit appropriate, and an election was held in October 1963 (Pet. App. A84-A92, A94). In a supplemental Board proceeding designed to resolve issues arising from the election, the evidence showed that Sewanee had been dissolved and that additional mine operators had ceased business after the Board had made its unit determination and had conducted the election. The Board found that the continuing strike by the Union was responsible for the closing of a number of the mines; that the dissolution of Sewanee was an attempt to withdraw from a multi-employer bargaining unit at an inappropriate time; that some former members of Sewanee continued to operate

during the strike; and that others would probably resume operations after the conclusion of the strike. Accordingly, the Board concluded that the multi-employer unit continued to be appropriate and, since the Union had received a majority of the ballots cast in the election, it certified the Union as the representative of the production and maintenance employees of the former members of Sewanee (Pet. App. A107-A123, A52). Following the certification, the former Sewanee members refused to bargain with the Union, giving rise to the present proceeding.

2. The court of appeals (Judge Edwards dissenting) declined to enforce the Board's order (Pet. App. A1-A39). The court found that, under the particular circumstances of this case, events before and after the election of October 1963 "destroyed the consensuality needed to justify the creation and * * * continuation of a 'multi-employer unit'" (Pet. App. A20). The court further found that, "by the time the certification of the UMW as the exclusive bargaining agent of [the employees of the former members of Sewanee] was made on June 7, 1965, there was not in existence a legitimately identifiable multi-employer unit which could be required to bargain with the UMW" (*ibid.*).

3. Petitioner contends that the court of appeals' decision conflicts with cases holding that members of a multi-employer unit may not withdraw from the unit after collective bargaining has commenced (Pet. 11). The court of appeals accepted that principle, however, but correctly noted that in those cases the issue was presented by individual members' ef-

forts to withdraw from ongoing multi-employer units. Here, the court found, there was initial doubt whether all the employers had unambiguously committed themselves to bargain through Sewanee, and there were no individual withdrawals from the unit; rather, the unit itself was "completely destroyed," and, after the strike commenced in December 1962, most of the employer members of the unit went out of business (Pet. App. A19, A3).

In reaching these conclusions, the court viewed the evidence differently than had the Board. The Board had noted that most of the mine companies had ceased business, but concluded that many of them could be expected to resume operations once the strike was over. Although the Board disagrees with the court's assessment of the evidence, it believes that, on that assessment, there is no conflict among the circuits and only an evidentiary issue is presented.

In view of the above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JUNE 1970.

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